

April 1989

# **Decisions of the Comptroller General of the United States**

## **Volume 68**

Pages 363-410

## Notice

Effective October 1, 1987, a revised vocabulary has been used to index Comptroller General decisions and other legal documents. The new vocabulary uses three types of headings—class headings, topical headings, and subject headings—to construct index entries which represent the subject matter of the documents. An explanation of the revised vocabulary is provided in the GAO Legal Thesaurus. Copies of the Thesaurus are available from the GAO Document Distribution Center, Room 1000, 441 G Street, N.W. 20548, or by calling (202) 275-6241.

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# Preface

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This pamphlet is one in a series of monthly pamphlets which will be consolidated on an annual basis and entitled *Decisions of the Comptroller General of the United States*. The annual volumes have been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. Decisions are rendered to heads of departments and establishments and to disbursing and certifying officers pursuant to 31 U.S.C. 3529 (formerly 31 U.S.C. 74 and 82d). Decisions in connection with claims are issued in accordance with 31 U.S.C. 3702 (formerly 31 U.S.C. 71). In addition, decisions on the validity of contract awards, pursuant to the Competition In Contracting Act (31 U.S.C. 3554(e)(2) (Supp. III) (1985), are rendered to interested parties.

The decisions included in this pamphlet are presented in full text. Criteria applied in selecting decisions for publication include whether the decision represents the first time certain issues are considered by the Comptroller General when the issues are likely to be of widespread interest to the government or the private sector, whether the decision modifies, clarifies, or overrules the findings of prior published decisions, and whether the decision otherwise deals with a significant issue of continuing interest on which there has been no published decision for a period of years.

All decisions contained in this pamphlet are available in advance through the circulation of individual decision copies. Each pamphlet includes an index-digest and citation tables. The annual bound volume includes a cumulative index-digest and citation tables.

To further assist in the research of matters coming within the jurisdiction of the General Accounting Office, ten consolidated indexes to the published volumes have been compiled to date, the first being entitled "Index to the Published Decisions of the Accounting Officers of the United States, 1894-1929," the second and subsequent indexes being entitled "Index of the Published Decision of the Comptroller" and "Index Digest—Published Decisions of the Comptroller General of the United States," respectively. The second volume covered the period from July 1, 1929, through June 30, 1940. Subsequent volumes have been published at five-year intervals, the commencing date being October 1 (since 1976) to correspond with the fiscal year of the federal government.

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Decisions appearing in this pamphlet and the annual bound volume should be cited by volume, page number, and date, e.g., 64 Comp. Gen. 10 (1978). Decisions of the Comptroller General that do not appear in the published pamphlets or volumes should be cited by the appropriate file number and date, e.g., B-230777, September 30, 1986.

Procurement law decisions issued since January 1, 1974 and Civilian Personnel Law decisions, whether or not included in these pamphlets, are also available from commercial computer timesharing services.

To further assist in research of Comptroller General decisions, the Office of the General Counsel at the General Accounting Office maintains a telephone research service at (202) 275-5028.

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# April 1989

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**B-222334.4, April 4, 1989**

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## **Civilian Personnel**

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### **Compensation**

■ **Compensation restrictions**

■ ■ **Deferred compensation**

■ ■ ■ **Propriety**

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## **Civilian Personnel**

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### **Compensation**

■ **Propriety**

■ ■ **Bonuses**

■ ■ ■ **Compensation restrictions**

In our opinion the Tennessee Valley Authority (TVA) may not circumvent the statutory ceiling on the salaries of TVA employees through deferred compensation supplemental retirement plans or lump-sum payments for relocation incentives. We disagree with TVA's distinction between "salary" and "compensation" for the purposes of the statutory ceiling. *See* B-222334, June 2, 1986; B-205284, Nov. 16, 1981. To the extent that TVA performance bonuses are modeled after the bonus program for the federal Senior Executive Service, we would not view such payments as improperly circumventing the TVA salary limitation.

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## **Matter of: The Honorable J. J. Pickle, House of Representatives**

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In your letter of October 18, 1988, you asked that we review certain pension and compensation-related matters involving upper level employees of the Tennessee Valley Authority (TVA). Our report which will respond to the several questions posed in your letter will be issued shortly.

As also requested, this letter sets forth our legal opinion on the authority of TVA to make payments to its employees which might exceed the statutory limitation of Level IV of the Executive Schedule (currently \$80,700) on the salary of TVA employees.<sup>1</sup> For the reasons set forth below, it is our opinion that certain payments which are clearly intended to circumvent the salary limitation are improper.<sup>2</sup>

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<sup>1</sup> 16 U.S.C. § 831b (1982).

<sup>2</sup> Our opinion is advisory only since TVA has final settlement authority over all claims and expenditures. 16 U.S.C. § 831h (1982). *See* B-222334, June 2, 1986.

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## Background

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### TVA's Methods of Compensating Top Managers

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In addition to the salary for certain top management positions, the TVA Board of Directors has authorized the creation of (1) the Merit Incentive Supplemental Retirement Income Plan (MISRIP), (2) the Relocation Incentive Plan, and (3) the Executive and Senior Manager Performance Bonus Plan.

Briefly stated, the MISRIP is a deferred compensation plan under which an employee receives certain credits while employed by TVA which become payable upon separation or retirement. No taxes are due until the amounts credited are paid to the employee, but the amounts credited are available for loans to the employee. Under the Relocation Incentive Plan, a newly-hired or transferred TVA employee receives a lump-sum payment as an inducement to relocate and accept a top TVA position. It is our understanding that such payments are in addition to the reimbursement of normal relocation expenses. Finally, TVA has recently announced a new performance bonus plan under which about 150 managers and executives will be eligible for bonuses not-to-exceed 30 percent of their annual salary.

The following are examples of payments to employees whose base salary was in excess of \$70,000 per year:

—a Senior Vice-President received a \$100,000 Relocation Incentive payment and a \$40,000 MISRIP credit in 1988;

—a Vice President received a \$48,000 Relocation Incentive payment in 1987 and a \$30,000 MISRIP credit in 1988;

—a Site Director received a \$48,000 Relocation Incentive payment in 1987 and a \$36,000 MISRIP credit in 1988;

—a Task Force Manager received a \$48,000 Relocation Incentive payment in 1985, a \$17,000 MISRIP credit in 1986, and a \$47,000 MISRIP credit in 1988;

—a Plant Manager received a \$48,000 Relocation Incentive payment in 1987 and a \$43,080 MISRIP credit in 1988; and

—the Inspector General received MISRIP credits of \$33,500 in 1986, 1987, and 1988, along with a Relocation Incentive payment of \$22,000 in 1986.<sup>3</sup>

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### TVA Comments

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In response to our request for comments on this inquiry, the General Counsel of TVA, by letter dated February 22, 1989, advised our Office that the above-described compensation arrangements are “fully within TVA’s legal authority.” The letter states that TVA has broad authority which is analogous to that conferred upon a private corporation to fix the compensation of its employees, and

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<sup>3</sup> See B-222334, *supra*, for a further discussion of these payments to the Inspector General.

the letter goes on to distinguish "compensation" from "salary," the latter of which is specifically limited by statute. The TVA General Counsel argues that our Office has specifically recognized and accepted that these payments are not part of the salary of a TVA employee.<sup>4</sup> In addition, the letter asserts that the MISRIP credit is an unfunded promise to pay which is not taxable when credits are made and which, therefore, cannot be considered part of the employee's salary. Finally, the letter argues that the relocation payments and performance bonuses, which are one-time, lump-sum payments, are elements of compensation and are clearly not treated as salary for the purposes of the TVA Act.

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## Opinion

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We have addressed some of these issues on two prior occasions in 1981 and 1986, and we find nothing in the TVA arguments which persuades us to change our opinion. The MISRIP and Relocation Incentive "compensation" plans represent a clear and direct circumvention of the salary limitation imposed by the Congress on the salary of TVA employees. That limitation is contained in 16 U.S.C. § 831b, and it states that no employee of TVA shall receive a salary in excess of that received by members of the TVA Board of Directors, currently level IV of the Executive Schedule which is paid \$80,700 per year. 5 U.S.C. § 5315 (Supp. IV 1986). This salary limitation will have no meaning if TVA continues to circumvent the limitation by characterizing these payments as "compensation."

In 1981, we considered a proposal by TVA to make payments over a period of 3 years to certain top executives who agreed to remain with TVA.<sup>5</sup> In support of its proposal, TVA argued the distinction between "salary" and "compensation" and argued that such payments were not covered by the statutory salary limitation. We disagreed and held that the proposed retention payments were clearly designed to set a higher rate of compensation for TVA's top executives in contravention of the statutory salary limitation.

In that same opinion we recognized that overtime compensation, occasional bonuses based on job performance or special circumstances, retirement fund contributions, and miscellaneous fringe benefits were not part of "salary" and therefore were properly considered "compensation." However, we specifically held that retention payments of \$36,000 per year were designed to set a higher rate of basic pay for TVA's top executives and must be considered part of their "salary." B-205284, *supra*.

In 1986, we were asked about certain payments to top TVA executives, specifically MISRIP credits and a Relocation Incentive payment to the TVA Inspector General. We held that, to the extent that such payments or credits would exceed the statutory ceiling on salary, they were without legal authority. B-222334, *supra*. To our knowledge, there have been no significant changes to

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<sup>4</sup> B-205284, Nov. 16, 1981.

<sup>5</sup> B-205284, *supra*.

the MISRIP or Relocation Incentive plans since we issued our opinion in 1986 which would warrant a different conclusion today.

With regard to TVA's performance bonus plan, we note that in a March 1989 announcement, TVA stated the plan would be similar in concept to the Senior Executive Service (SES) bonus plan in existence in many federal agencies. TVA News Release dated March 15, 1989. We recognized in our 1981 opinion that occasional bonuses based on job performance or special circumstances were not subject to the salary limitation. Therefore, if TVA makes payments under a performance bonus plan modeled after the federal SES plan, we would have no objection to such payments.

However, to the extent that TVA uses the plan to circumvent the salary limit in the manner it has used the MISRIP and Relocation Incentive plans for that purpose, we would object to such payments for the reasons set forth above.

As we noted in 1981 and again in 1986, TVA may well be experiencing difficulties in recruiting and retaining top executives due to the salary limitations imposed by the statutory ceiling. We have recognized these problems in many federal agencies, and we have referred to those problems in recent reports. See our Transition Series Report on The Public Service, GAO/OCG-89-2TR (Nov. 1988). If TVA is convinced of the need to raise its salary levels in order to recruit and retain top executives, we believe that TVA should bring that matter to the attention of the Congress for amendment or repeal of 16 U.S.C. § 831b.

We trust that this is responsive to your request for our legal opinion on these matters. We will delay distribution of this letter for 30 days unless we receive further instructions from your office.

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**B-231938, April 4, 1989**

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**Appropriations/Financial Management**

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**Judgment Payments**

**■ Attorney fees**

An employee who filed an agency grievance alleging that his reassignment was in retaliation for his whistleblowing, received a favorable settlement but no backpay or other monetary award. Since the grievance did not involve a reduction or denial of pay or allowances, it was not subject to the Back Pay Act, as amended, 5 U.S.C. § 5596 (1982). He may not be reimbursed his attorney fees since there is no statutory or other authority for the payment of attorney fees in connection with an administrative grievance proceeding where there is no backpay or other monetary award.

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**Appropriations/Financial Management**

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**Judgment Payments**

**■ Attorney fees**

An employee who settled an agency grievance may not be reimbursed his attorney fees under the Equal Access to Justice Act. The Act only applies to "adversary adjudications" and the agency grievance is not within the statutory definition of an adversary adjudication.

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## Matter of: Stanley D. Welli—Attorney Fees

The Internal Revenue Service (IRS) requests our decision regarding whether payment may be made from agency appropriations to reimburse Stanley D. Welli, an IRS employee, for attorney fees in connection with settlement of an agency grievance brought by Mr. Welli. Because there is no legal authority for payment of attorney fees in such a case, reimbursement may not be made.

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## Background

Mr. Welli's GM-14 operations manager position was abolished as a result of a reorganization. He was reassigned to a GS-14 staff assistant position and subsequently was denied a transfer to a GM-14 audit manager position. Mr. Welli then retained legal counsel and filed an agency grievance alleging, in part, that the reorganization under which he was reassigned was in retaliation for whistleblowing allegations that he had made. He also filed a complaint with the Office of the Special Counsel, Merit Systems Protection Board, apparently involving the same matters as the grievance, that is still ongoing.

The grievance was settled to the employee's satisfaction. Mr. Welli was given a GM-14 audit manager position and some other incidental and collateral relief, but no backpay or other monetary award.

Mr. Welli seeks to be reimbursed for his attorney fees. The IRS recognizes the general rule that unless there is express statutory authority, reimbursement of attorney fees may not be allowed. *E.g., Norman E. Guidaboni*, 57 Comp. Gen. 444 (1978). The IRS asks whether the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), supplies this necessary authority. If not, the IRS asks whether such authority could be found in two of our cases, 61 Comp. Gen. 515 (1982) and *Jeanette E. Nichols*, 67 Comp. Gen. 37 (1987).

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## Opinion

Initially, we point out that we have held that an employee who prevails in a grievance handled under agency grievance procedures but receives no monetary award cannot be reimbursed his attorney fees. *See Julian C. Patterson*, 61 Comp. Gen. 411 (1982). Our holding reflects the general rule that in the absence of express statutory authority an employee may not be reimbursed his attorney fees. Specifically, we held that, since the grievance did not involve any reduction or denial of pay or allowances, it was not subject to the Back Pay Act, as amended, 5 U.S.C. § 5596 (1982), and attorney fees could not be awarded under that authority. *See id.* at 413-414.

The Equal Access to Justice Act does not provide an alternate source of the necessary statutory authority. The Act enables an agency that conducts an "adversary adjudication" to award fees and expenses incurred by a prevailing party. 5 U.S.C. § 504(a)(1). The Act defines adversary adjudication as a proceeding under the Administrative Procedure Act (APA), 5 U.S.C. § 554, in which the position of

the United States is represented by counsel or otherwise, 5 U.S.C. § 504(b)(1)(C). Although not clearly reflected in the original case record, we were able to verify from the IRS that their grievance proceedings are not governed by or under the APA. Therefore, this grievance is not an adversary adjudication under the Equal Access to Justice Act and that authority is not available to pay the attorney fees in question. *See Cherokee Leathergoods, Inc.*, B-205960.2, Dec. 27, 1982.

Nor do 61 Comp. Gen. 515, *supra*, and *Jeannette E. Nichols*, 67 Comp. Gen. 37, *supra*, provide the necessary authority. In these cases we held that supervisors or employees charged with prohibited personnel practices by the Merit Systems Protection Board could have their attorney fees paid for by the agency out of appropriated funds.

Clearly, the facts of the present case do not come under the rule of law set out immediately above. Mr. Welli is not "an employee who [was] forced to defend himself against charges arising out of conduct which was within the scope of his Federal employment." 61 Comp. Gen. at 516. This is not a case in which the government's interest is aligned with the interest of the employee against charges pressed by a third party. *See generally* B-212487, Apr. 17, 1984; 58 Comp. Gen. 613, 618-619 (1979). Rather, this is a case in which the employee is complaining of the agency having taken action against him.

Accordingly, the IRS may not reimburse Mr. Welli for his attorney fees.

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## **B-233676, April 5, 1989**

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### **Procurement**

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#### **Specifications**

- Minimum needs standards
- ■ Competitive restrictions
- ■ ■ Allegation substantiation
- ■ ■ ■ Evidence sufficiency

Protest that specification for copiers unduly restricts competition is sustained when agency does not establish that requirement that copiers use dry toner only is necessary to meet the government's needs.

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### **Matter of: Data-Team, Inc.**

Data-Team, Inc., protests that invitation for bids (IFB) No. F04609-88-B0053, issued by the Department of the Air Force for copier machines, supplies and materials, is unduly restrictive of competition because it specifies that copiers must use dry toner only and thereby excludes copiers using liquid toner from consideration. Data-Team asserts it could bid lower prices for liquid-toner copiers because they are less expensive to acquire, to operate and to maintain than dry-toner copiers.

We sustain the protest.

The Air Force is soliciting bids for paper, supplies and reproduction machines to provide copy service at George Air Force Base, California, a Tactical Air Command base. According to the Air Force, the using activity has a specific mission requirement to switch quickly to a wartime posture in the event of a "go-to-war" mobilization, which requires that copiers be able to be moved quickly and easily. The Air Force states that the liquid-toner copiers that Data-Team supplied under an existing contract require extra care to move and, ultimately, an absolutely level surface in order to prevent leakage. The Air Force asserts that the documented leakage of existing wet-toner copiers, the potential leakage during mobilization, and the poor repair service record of existing copiers adversely affect mission capability and support its decision to specify dry-toner copiers.

Data-Team argues that the liquid-toner copier it would supply can be moved quickly and easily by either draining the toner from its reservoir, which takes 30-60 seconds, so that the copier can be carried without risk of spillage, or by removing the toner reservoir and moving it separately from the copier. Data-Team also asserts that spillage is a concern for a dry-toner copier, whose powdered toner can easily spill out of the machine if moved improperly. Furthermore, Data-Team states many dry-toner copiers also use a liquid substance called fuser oil or silicone oil which can spill out of its reservoir if not handled properly.

Data-Team notes that other Air Force bases which are elements of the Strategic Air Command (SAC) have agreed to accept liquid-toner copier after receiving protests of their solicitations which were restricted to dry-toner copiers. According to Data-Team, the General Services Administration, the Air Force Air Training Command and the Tennessee Valley Authority have also removed "dry toner" restrictions from their solicitations.

Data-Team states that it performed the prior contract with discontinued machines permitted by the terms of the prior contract, and problems the Air Force experienced with those machines could be attributed to usage, repair and perhaps the age of the machine, rather than the kind of toner used by the copier. Data-Team notes that this IFB requires new copiers, and states it would supply state-of-the-art copiers from Savin Corporation, which have been reported by Buyers Laboratory, Inc., an independent testing company, to have low downtime and utilize toner and dispersant cartridges which are very easy to install.

The Competition in Contracting Act of 1984 requires agencies to develop specifications in such a manner as is necessary to obtain full and open competition and to include restrictive provisions only to the extent necessary to satisfy agency needs. 10 U.S.C. § 2305(a)(1)(B) (Supp. IV 1986). Where a solicitation provision is challenged as restrictive, the initial burden is on the procuring agency to establish *prima facie* support for its belief that the challenged provision is necessary to satisfy its needs. *Dock Express Contractors, Inc.*, B-223966, Dec. 22, 1986, 86-2 CPD ¶ 695. In our review of the issues, we examine the adequacy of the agency's position not simply with regard to the reasonableness of the rationale asserted but also the analysis given in support of these reasons, *Clever*



*Brooks*, B-213000, June 29, 1984, 84-2 CPD ¶ 1, to assure that the agency's explanation will withstand logical scrutiny. *Fleetwood Electronics, Inc.*, B-216947.2, June 11, 1985, 85-1 CPD ¶ 664. When and if this *prima facie* support is established, the burden shifts to the protester to rebut the agency's position and show that the allegedly restrictive provision is unreasonable. *Morse Boulger, Inc.*, 66 Comp. Gen. 174 (1986), 86-2 CPD ¶ 715.

Here, though the Air Force has made a *prima facie* showing that the "dry toner only" requirement is related to its need to relocate copiers quickly without leakage in the event of a "go-to-war" mobilization, Data-Team has shown that the requirement is unreasonable. While the Air Force reports that it has had problems with leakage from copiers using liquid toner at George Air Force Base, Data-Team has demonstrated that the Air Force's limited experience with discontinued copiers is not sufficient to judge the capabilities of all liquid toner machines. The Air Force points to no review of technical data or industry reports rating various copiers in support of its position that only dry-toner copiers can be relocated quickly without leakage. Data-Team, however, has explained how a recent model of liquid-toner copier can be moved quickly without risk of spillage, and has furnished an independent testing company's report that a new liquid-toner copier has toner and dispersant cartridges which are very easy to install. Also, the Air Force has not rebutted Data-Team's allegation that copiers using dry toner are subject to spillage if not properly handled and that some dry-toner copiers use a liquid substance.

Furthermore, Data-Team has listed a number of SAC bases which have removed "dry toner only" restrictions from their solicitations. Data-Team notes that because the SAC mission includes response to nuclear attack, its need to shift to a wartime posture is no less compelling than that claimed by George Air Force Base. Data-Team argues that if SAC officials could conclude there was no need to exclude liquid-toner copiers, George Air Force Base's determination that only dry-toner copiers will meet its needs is not entitled to special deference by our Office by virtue of military necessity.

In these circumstances, we do not believe that the Air Force's exclusion of liquid-toner copiers from the specification has been adequately justified. While we recognize that the Air Force may have a need for copiers which can be quickly and easily moved without leakage of toner, it has not shown that it could not structure the solicitation to accomplish this purpose without eliminating all liquid-toner copiers from the competition.

Accordingly, we sustain Data-Team's protest. By letter of today to the Secretary of the Air Force, we are recommending that the Air Force amend the IFB to provide specifications that permit full and open competition and accurately represent the agency's minimum needs. In addition, we find that Data-Team is entitled to the costs of filing and pursuing its protest, including attorneys' fees. *Southern Technologies, Inc.*, 66 Comp. Gen. 208, 87-1 CPD ¶ 42. Data-Team should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(e) (1988). However, the protester is not entitled to the recovery of its bid preparation costs, since it was not required to submit a proposal to challenge the "dry

toner only" restriction. *See Malco Plastics*, B-219886, Dec. 23, 1985, 85-2 CPD ¶ 701.

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**B-233804, April 6, 1989**

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**Appropriations/Financial Management**

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**Accountable Officers**

■ Cashiers

■ ■ Relief

■ ■ ■ Illegal/improper payments

■ ■ ■ ■ Fraud

Under the provisions of 31 U.S.C. § 3527(c), we deny relief to a Veterans Administration cashier who accepted for deposit a fraudulently negotiated draft and who later permitted withdrawal from a patron's account amounts credited for these deposits. The cashier negligently failed to follow printed instructions to call the bank for an authorization number before cashing. Had the cashier followed the instructions, clearly printed on the draft, the cashier would not have accepted the drafts for deposit and permitted subsequent withdrawals of the supposed deposits.

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**Matter of: Controller, Veterans Administration**

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This responds to your request of November 28, 1988, that we relieve Keith Campbell, an agent cashier working for the Veterans Administration (VA), from liability under 31 U.S.C. § 3527 (1982), for a loss of \$3,950. For the reasons discussed below, we deny the requested relief.

On July 25, 1988, Robert C. Lamb, an inpatient at the Center, presented two "Greenback Money Drafts" for deposit into the Personal Funds of Patients account at the VA Medical Center (Center) in Louisville, Kentucky. The drafts were for \$1,500 and \$700. Mr. Campbell, the agent cashier for the account, has stated that he had seen these drafts before, and that he was aware of what they were. Because Mr. Campbell believed the drafts to be cashier's checks or money orders, he did not apply a 10 day credit deferral to the drafts. Instead, he immediately credited Mr. Lamb with \$2,200 after Mr. Lamb endorsed the drafts and showed his driver's license to Mr. Campbell.

After depositing these drafts, Mr. Lamb proceeded over the next two days to withdraw from the account a total of \$3,950. On July 25, he withdrew \$100; on July 26, he withdrew \$600. On July 27, Mr. Lamb presented for deposit another Greenback Money Draft for \$1,800. Mr. Campbell treated this draft in the same fashion as the prior two drafts and credited Mr. Lamb's account with the draft amount. Later that day, Mr. Lamb requested withdrawal of \$2,200 from the account. At first Mr. Campbell questioned Mr. Lamb about the withdrawal, but he gave Mr. Lamb the requested sum in twenty dollar bills. Still later the same day, Mr. Lamb withdrew an additional \$1,050 in the same manner. Thus, as of July 27, Mr. Lamb had apparently deposited \$4,000 into the account and had withdrawn \$3,950.

The Center eventually discovered that Mr. Lamb had fraudulently negotiated the drafts he had submitted to Mr. Campbell. On August 15, 1988, the payee bank, NTS, returned the first of the three drafts. Someone at the Center called NTS and discovered that the draft had contained a false money transfer code and authorization number. On August 16, 1988, NTS informed the Center that all three of the drafts which Mr. Campbell deposited were invalid.

The Greenback Money Draft which Mr. Lamb negotiated is not a check at all. Instead, it is a type of bank draft used by NTS, Inc., as part of its specialized money transfer system. NTS provides blank drafts in public places throughout the United States. On the front of these drafts is printed the following: "Do not cash before calling. To obtain an Authorization Number, Call Toll Free: [the provided number]." Further, on the back of these drafts, where the payee's signature is required, is printed the following:

**IMPORTANT:**

This check will not be honored without:

1. Valid Driver's License Information
2. Payee's Signature
3. *NTS Authorization Number—You must call NTS before cashing.* (Italic added.)

NTS includes the quoted language on their drafts because it requires approval of a draft by its authorization center, which determines whether the payor has sufficient funds in an NTS account, before NTS will honor the draft. Thus, while the NTS draft may appear to be similar to ordinary checks in some respects, its limited negotiability is denoted on the front and back.

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## **Discussion**

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Under the facts presented, Mr. Campbell is an accountable officer, even though the trust account consists of VA patients' deposits rather than federal dollars. See B-125477, November 5, 1984. Therefore, Mr. Campbell is personally liable for any losses to the trust account resulting from erroneous payments unless relieved of liability under 31 U.S.C. § 3527(c). This provision allows us to grant relief to accountable officers for deficiencies arising from illegal, improper, or erroneous payments, when we determine that the payment was not the result of bad faith or lack of reasonable care by the officer.

The facts as presented to us indicate that Mr. Campbell failed to use reasonable care in accepting the Greenback Money Drafts for deposit, and that this failure caused the loss to the trust account. Mr. Campbell failed to follow the instructions, printed on the draft's front as well as back, which directed Mr. Campbell to call for an authorization number and which warned that the draft was invalid without authorization. Having examined a copy of the draft, we conclude that a reasonable person in Mr. Campbell's position would have seen and heeded the clear language on the draft's face and back, and attempted to obtain or confirm authorization from NTS before crediting Mr. Lamb's account. Had Mr. Campbell done so, he would have immediately discovered Mr. Lamb's at-

tempted fraud, and this would have prevented the subsequent erroneous payment of funds from the account to Mr. Lamb.<sup>1</sup>

Thus Mr. Campbell's negligent acceptance of drafts for deposit and subsequent payments based on the resulting fictitious fund balances made the later payment an improper one. *See, e.g.,* B-226911, October 19, 1987.

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**B-233361, April 7, 1989**

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**Civilian Personnel**

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**Relocation**

- **Residence transaction expenses**
- ■ **Miscellaneous expenses**
- ■ ■ **Reimbursement**

A transferred employee claims reimbursement for shipping charges incurred by him to speed delivery of his loan documents to the lender incident to the purchase of a residence. The claim is denied. Such shipping charges are not specifically listed as items to be reimbursed under FTR, para. 2-6.2d(1)(a-e) (Supp. 4, Oct. 1, 1982). Nor are shipping (delivery) charges "similar in nature" to the specifically listed reimbursable items as authorized in FTR, para. 2-6.2d(1)(f). None of the listed authorized expenses relates to shipping or delivery fees; therefore, the shipping charges may not be allowed under any of those clauses, nor under FTR, para. 2-6.2f which authorizes reimbursement for incidental charges since the expense was not for a "required service."

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**Civilian Personnel**

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**Relocation**

- **Residence transaction expenses**
- ■ **Appraisal fees**
- ■ ■ **Reimbursement**

A transferred employee claims reimbursement for a fee paid to the lender reflecting an appraiser's charge for inspecting the employee's newly constructed residence prior to the closing date. Pursuant to FTR, para. 2-6.2d(1)(j), only those construction expenses which are comparable to allowable expenses associated with the purchase of an existing residence may be reimbursed. The customary cost of an appraisal is such an expense and is, therefore, reimbursable as provided by FTR, para. 2-6.2b.

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<sup>1</sup> We note your conclusion that Mr. Campbell's negligent failure to defer credit for the required 10-day waiting period was not the cause of the trust account's loss in this case. As your letter states, the VA was not able to discover that Mr. Lamb's drafts were invalid within this 10-day period. Given our conclusion, we did not address this issue.

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## Civilian Personnel

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### Relocation

- Residence transaction expenses
- ■ Mortgage insurance
- ■ ■ Reimbursement

A transferred employee claims reimbursement for two title insurance policy endorsements. FTR, para. 2-6.2d(1)(h) specifically authorizes reimbursement of mortgage title insurance premiums paid for by employees and required by lenders. The endorsements are reimbursable.

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### Matter of: George C. Souders—Transfer—Real Estate Expenses

This decision is in response to a request from an Authorized Certifying Officer<sup>1</sup> concerning the entitlement of Mr. George C. Souders to be reimbursed certain real estate expenses incident to a permanent change of station in June 1987. We hold that the shipping charges incurred transmitting the loan package may not be reimbursed as a residence transaction expense; however, the lender's inspection fee and the two title insurance policy endorsement fees are reimbursable.

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### Background

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Mr. George C. Souders, an employee of the Internal Revenue Service (IRS), purchased a partially constructed residence in connection with his transfer from Cedar Rapids, Iowa, to Cincinnati, Ohio. By travel voucher, dated September 16, 1987, he submitted a real estate expense claim incident to purchase, construction, and permanent financing of the residence, totaling \$4,350. Of that amount, the following items, totaling \$254, were disallowed by the IRS on the basis that the items represented nonreimbursable finance charges under Regulation Z.<sup>2</sup>

(1) Shipping Charges—Loan Package	\$ 69.00
(2) Lender's Inspection Fee	35.00
(3) Title Insurance Endorsement Fee—Variable Interest Rates	75.00
(4) Title Insurance Endorsement Fee—EPA Lien Protection	75.00
	\$254.00

Mr. Souders resubmitted his travel voucher to claim the previously disallowed items, along with a letter from the attorney representing the lender which explains what the charges represent. Mr. Souders contends that it is apparent that the items are not "finance charges" and are therefore reimbursable.

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### Opinion

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The provisions governing reimbursement for real estate expenses incident to a transfer of duty station are contained in 5 U.S.C. § 5724(a) (1982) and regula-

<sup>1</sup> Georgia Fannin, Internal Revenue Service, Cincinnati, Ohio.

<sup>2</sup> Service charges imposed in connection with the extension of credit are specifically listed as finance charges under the Truth in Lending Act, Title I, Pub. L. 90-321, May 29, 1968, 82 Stat. 146, as amended, 15 U.S.C. §§ 1601-1667, and the implementing provisions of Regulation Z, 12 C.F.R. § 226.4 (1985).

tions issued pursuant thereto. Those regulations are contained in part 6 of chapter 2, Federal Travel Regulations (Supp. 1, Sept. 28, 1981), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1987) (FTR), as amended by Supp. 4, Aug. 23, 1982.

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### Shipping Charges

Shipping charges imposed for the delivery of a loan package are not specifically listed as items to be reimbursed, nor are they “similar in nature” to those items in FTR, para. 2-6.2d(1)(a-e).<sup>3</sup> In our decision in *Mark B. Gregory*, B-229230, Mar. 14, 1988, we disallowed Federal Express charges incurred by an employee to speed delivery of his mortgage loan application based on the above analysis. Accordingly, we conclude that Mr. Souders may not be reimbursed the \$69 expense for the shipping charges as a residence transaction expense.<sup>4</sup>

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### Lender’s Inspection Fee

This fee for which Mr. Souders claims reimbursement reflects the cost of an inspection “by the appraiser representing the lender to insure completion of the house by the time of closing.” The basic issue to be resolved in residence construction cases is whether the particular expense claimed is one which is comparable to a reimbursable expense incurred as a result of the purchase of an existing residence.<sup>5</sup> We have held that only those expenses resulting from construction which are comparable to expenses allowable in connection with the purchase of an existing residence may be reimbursed.<sup>6</sup>

Customarily, a lending institution requires an appraisal for residence purchase purposes so that it can determine whether it will provide permanent mortgage financing and, if so, the amount to be loaned.<sup>7</sup> Pursuant to FTR, para. 2-6.2b, the customary cost of an appraisal may be reimbursed. In the instant case, the fee paid to the lender’s appraiser for inspecting the house was incident to the completion of construction and was required by the lender prior to the closing. Therefore, the lender’s appraisal fee of \$35 is reimbursable.

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### Title Insurance Policy Endorsements

Mr. Souders further claims reimbursement for two title insurance policy endorsements. FTR, para. 2-6.2d(1)(h) specifically provides for reimbursement of mortgage title insurance policy charges, paid for by the employee for the protection of, and required by, the lender. This type of insurance protects the lender against possible defects in the purchaser’s title to the property. *Daniel T. Mates*, B-217822, June 20, 1985; *see also Michael S. Kochmanski*, B-227503, Aug. 20, 1987. In the instant case, the lender has required Mr. Souders to pay the two

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<sup>3</sup> See specifically, FTR, para. 2-6.2d(1)(f).

<sup>4</sup> We note, however, that the charges incurred to transmit the loan documents were covered under the \$700 miscellaneous moving expense allowance which the employee was paid.

<sup>5</sup> See FTR, para. 2-6.2d(1)(j).

<sup>6</sup> *Barry L. Nadler*, B-231537, Nov. 14, 1988; *Ray F. Hunt*, B-226271, Nov. 5, 1987.

<sup>7</sup> See *J. Dain Maddox*, B-214164, July 9, 1984.

title insurance endorsement charges. One is required for all variable interest rate loans sold in the secondary mortgage market. The other, an Environmental Protection Agency (EPA) lien endorsement, protects the lender against any liens that may have been filed by the EPA involving toxic waste cleanup. This endorsement is required for any loan sold in the secondary mortgage market after September 1, 1987. Since both these charges were required by the lender, Mr. Souders is entitled to reimbursement for them.

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## **Conclusion**

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Accordingly, we sustain the agency's disallowance of the shipping charges. However, Mr. Souders may be reimbursed for the lender's inspection fee, and the two title endorsement fees, for a total of \$185.

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**B-233756, April 10, 1989**

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## **Procurement**

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### **Contract Management**

- **Contract modification**
- ■ **Cardinal change doctrine**
- ■ ■ **Criteria**
- ■ ■ ■ **Determination**

Protest that a contract modification was beyond the scope of the contract is denied where the modification did not result in the procurement of services materially different from the services competed under the original contract.

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## **Procurement**

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### **Bid Protests**

- **Subcontracts**
- ■ **GAO review**

Protest of a subcontract awarded by a government prime contractor is dismissed where the subcontract is not "by or for" the government.

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## **Matter of: CAD Language Systems, Inc.**

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CAD Language Systems, Inc. (CLSI), protests the Department of the Air Force's modification of contract No. F33615-87-C-1401, a cost-reimbursement research and development contract awarded to Honeywell, Inc., for development of an engineering information system (EIS). CLSI contends that the work called for under the modification is beyond the scope of work set out in the prime contract, and argues that the work should be obtained by competitive procurement. CLSI further contends that Honeywell improperly awarded a subcontract without competition for part of the work required by the modification.

We deny the protest in part and dismiss it in part.

The prime contract grew out of The Department of Defense Requirement for Engineering Information Systems, July 2, 1986 (DOD Requirement), which generally describes the background and purpose of EIS and provides a full set of requirements for the system. The DOD Requirement notes that advances in the miniaturization of electronics resulting in increasingly complex electronic designs have necessitated the use of computer-aided engineering (CAE).<sup>1</sup> Current electronic systems are so complex that it is practically impossible to engineer them without CAE tools<sup>2</sup> and support systems. As stated in the DOD Requirement, the problem is that:

[T]he usefulness of these tools and systems is reduced . . . since no particular vendor has an integrated toolset that performs all of the steps needed and/or desired for engineering a system from the requirements phase, through specification and design, all the way to manufacturing and maintenance.

Anticipating that introduction of very high speed integrated circuits (VHSIC) technology will further increase design complexity and worsen the tool integration problem, the DOD Requirement outlines EIS as a means of providing a framework for tool integration based on information sharing. Two of EIS's five basic functions are:

Tool Integration—the ability to operate, efficiently and uniformly, a number of tools [applications] with different data and hardware requirements, [and]

Data Exchange—the ability to translate and to communicate data among different hosts [types of computers] and tools not only within the EIS but also between the EIS and external systems (including other EISs).

The idea behind tool integration is to provide the user with an environment where the most appropriate tool can be used without concern for the kind of computer on which the tool is installed. The DOD Requirement specifies that EIS “must be able to function efficiently in a distributed environment that includes different types of mainframes and workstations . . . the system itself must be portable across different systems.” In other words, EIS integrates various CAE tools in a standard environment and allows the linking of different CAE environments. Finally, the DOD Requirement states that it is critical that EIS achieve industry acceptance on a large scale by appealing both to end-users and decision-makers.

CLSI, a Honeywell subcontractor, designs, develops and markets computer software in the area of computer-aided design (CAD). As a subcontractor, CLSI is responsible for integrating government-furnished VHDL<sup>3</sup> software with EIS on host computer systems manufactured by Digital Equipment Corporation (DEC) and Sun.

In June 1987, the agency awarded Honeywell the \$17,184,503 prime contract entitled “Engineering Information System.” The contract consists of two line

<sup>1</sup> CAE is a generic term which encompasses computer-aided design, computer-aided manufacturing, and computer-integrated manufacturing.

<sup>2</sup> Generally, the word tool is used in this decision to refer to an entire software package or application.

<sup>3</sup> VHDL is a Department of Defense (DOD) developed text-oriented language, which stands for VHSIC (very high speed integrated circuits) Hardware Description Language, and is used in designing digital systems.



items: item 0001, Research and Data, and item 0002, Computer Software. The contract calls for the work to be performed in three phases: (1) develop an EIS specification meeting the DOD Requirement, and plan how that specification can be implemented and demonstrated to users; (2) build an EIS prototype by writing and testing software that implements the phase one specification and demonstrates the usefulness of EIS in integrating disparate design tools; and (3) install the phase two EIS prototype software on a computer at a government specified site, ensure that it functions correctly, and demonstrate the end product.

In August 1988, the agency asked Honeywell to submit a change proposal that would make the required demonstration more realistic by showing how the CAE tool VHDL could be used with EIS to design large integrated circuits on a high performance super mini-computer system. The agency decided that the completed prototype could best be demonstrated by running real designs through the system showing an actual operational use. The agency required the use of a super mini-computer because such a machine would substantially increase system performance and because industry representatives advised the agency that something had to be done to increase the efficiency and speed of the EIS prototype demonstration if the agency wanted to prove a realistic EIS capability.

On September 28, after evaluating Honeywell's change proposal, the agency modified the prime contract (modification P0003 for \$2,058,725) by specifying how the contractor was to perform the phase three installation and demonstration. The modification required: (1) purchase of a super mini-computer; (2) 1 year of maintenance for the super minicomputer; (3) the modification of a set of government-furnished VHDL tools to operate using the super mini-computer; and (4) training. Since the protester concedes that training was part of the prime contract, we will not consider the matter of training further.

We generally do not consider protests against contract modifications since modifications involve contract administration, which is the responsibility of the contracting agency, not our Office. *Wayne H. Coloney Co., Inc.*, B-215535, May 15, 1985, 85-1 CPD ¶ 545. We will consider, however, situations where it is alleged that a modification improperly exceeds the scope of the prime contract and therefore should be the subject of a new procurement. *Clean Giant, Inc.*, B-229885, Mar. 17, 1988, 88-1 CPD ¶ 281. In weighing the propriety of a modification, we look to whether there is a material difference between the modified contract and the prime contract that was originally competed. *Aero-Dri Corp.*, B-192274, Oct. 26, 1978, 78-2 CPD ¶ 304.

In determining the materiality of a modification we consider factors such as the extent of any changes in the type of work, performance period and costs between the modification and the prime contract. *See American Air Filter Co., Inc.*, 57 Comp. Gen. 285 (1978), 78-1 CPD ¶ 136, *aff'd on reconsideration*, 57 Comp. Gen. 567, 78-1 CPD ¶ 443. In this regard, we also consider whether the prime contract solicitation adequately advised offerors of the potential for the

type of changes during the course of the contract that in fact occurred. *National Data Corp.*, B-207340, Sept. 13, 1982, 82-2 CPD ¶ 222.

CLSI urges that the work called for under the modification is beyond the scope of work set out in the prime contract, and therefore required a new procurement. Based on a thorough review of the record, we find that the modifications were within the scope of the prime contract. Accordingly, the agency was not required to conduct a new procurement for the work in question.

The protester offers several challenges to the propriety of modification P0003 contending that: (1) the modification is improper because it is not related to the prime contract's EIS prototype demonstration requirement; (2) even if the modification is related to the demonstration requirement, a workstation should be used for the demonstration instead of the super mini-computer because it is uncertain that a super mini-computer can provide the desired results (ability to design large integrated circuits, improve EIS performance, and facilitate industry acceptance of EIS standards); and (3) purchase of computer hardware is beyond the scope of the contract.

Regarding CLSI's contention that the modification was made for a purpose unrelated to the prime contract, this argument rests upon the assumption that the EIS prototype will not be used with the VHDL tool on the super minicomputer. CLSI reads modification P0003 as requiring two separate and independent products: (1) a completed EIS prototype which the agency would receive anyway under the prime contract; and (2) the modified VHDL software on the super mini-computer. The protester speculates that the two products will be installed separately and that the EIS prototype cannot be used with the super mini-computer. The protester further speculates that the agency's only intended use for the super mini-computer is demonstrating Intermetrics' VHDL software. We disagree. The modification clearly states that the "[the EIS] prototype delivered . . . shall include the hardware and software necessary to generate . . . VHDL descriptions of large VHSIC integrated circuits," and that the "contractor shall rehost . . . the . . . VHDL toolset . . . to the proposed super minicomputer." Obviously, the super mini-computer is being purchased for a purpose related to the prime contract's EIS prototype demonstration requirement.

CLSI's argument that the EIS prototype demonstration should use a workstation instead of the super mini-computer, because it has not been technically established that a super mini-computer can provide the results the agency desires, is equally lacking in merit. Essentially, the protester contends that the EIS prototype demonstration should be restricted to a workstation environment using Sun, Vax, Apollo and similar sized computers often used for engineering operations. We disagree. The DOD Requirement explicitly requires EIS to "function efficiently in a distributed environment that includes different types of *mainframes and workstations*." (Italic supplied). Since the DOD Requirement contemplates efficient EIS functioning in a mainframe environment we do not think it unreasonable that the agency should select a super mini-computer which has capabilities greater than a workstation, but less than a mainframe, as a demonstration vehicle.

We also see no merit in the protester's assertion that the prime contract does not contemplate the purchase of computer hardware. The agency reports that both the computer and the software will become integral parts of the EIS prototype. We note that the super mini-computer is the second computer purchased by Honeywell during the course of contract performance, and that both computers will be delivered to the government upon completion of the contract. The agency advises that it required Honeywell to obtain the maintenance provided under the modification in order to protect the government's investment in the machine.

We think the need for Honeywell to obtain computer hardware is clear since the prime contract requires the contractor to install the EIS prototype on a computer and ensure that it functions correctly before demonstrating it, and the agency has not undertaken to provide the computer as government furnished property. Since the contract does not express a preference for hardware lease or purchase, and requires the installation of the EIS prototype software at a government site, on a computer not currently owned by the government, we think the prime contract's scope is sufficiently broad to contemplate either contractor lease or contractor purchase as a means of obtaining the required computer hardware for the EIS prototype demonstration. Moreover, as this is a research and development contract, we think it was reasonable for the agency to postpone its decision on computer hardware acquisition, thereby keeping its options open, until it had a better idea of the EIS prototype's capabilities and the best means of demonstrating them. Further, the modification did not expand the delivery schedule nor add unreasonably to the costs given the uncertain nature of the effort.

Finally, CLSI protests Honeywell's award of a subcontract to Intermetrics for VHDL software changes required by modification P0003. The protester alleges that the agency directed Honeywell to purchase the modified VHDL software from Intermetrics even though Honeywell already had a subcontract with CLSI for the same kind of effort (*i.e.*, internal modification of the government-furnished VHDL software, replacing sections of existing source code with new code) and could either have been directed to do the work or competed for it. The record shows that Honeywell selected Intermetrics for the work because modification P0003 required work on the VHDL simulator's source code which Intermetrics had written.

The agency maintains that we should not consider this aspect of the protest because it involves the award of a subcontract by a government prime contractor and the circumstances under which we consider such protests do not exist here. We agree.

Our Office does not review subcontract awards by government prime contractors except where the award is by or for the government. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(10) (1988). This limitation on our review is derived from the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551 *et seq.* (Supp. IV 1986), which provides for our consideration of bid protests concerning procurements by federal agencies. In the context of subcontractor selections, we

interpret CICA to authorize our Office to review protests only where, as a result of the government's involvement in the award process or the contractual relationship between the prime contractor and the government, the subcontract in effect is awarded on behalf of—"by or for"—the government.

Here, notwithstanding the protester's contention that Honeywell acts as the government's agent under the prime contract, we find that the prime contract—a typical cost reimbursement contract—merely requires contractor management of its own internal administrative and financial functions during contract performance, and the periodic provision of status reports on schedule and cost matters under the contract data requirements list. Such minor management responsibilities in a cost-reimbursement contract do not make any subcontract awards under that contract "by or for" the government, and mere approval of a subcontract does not establish the direct and active participation in the subcontractor selection process that is required to find that a subcontract award was "by or for" the government. *Edison Chouest Offshore, Inc., et al.*, B-230121.2, B-230121.3, May 19, 1988, 88-1 CPD ¶ 477. Accordingly, we see no basis to review the subcontract award by Honeywell.

The protest is denied in part and dismissed in part.

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**B-234010, April 11, 1989**

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**Procurement**

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**Contractor Qualification**

■ Approved sources

■ ■ Alternate sources

■ ■ ■ Approval

■ ■ ■ ■ Government delays

Unwarranted delays in agency's alternate source approval process that prevented prompt qualification of protester's product is not basis for sustaining protest where agency canceled the solicitation with the intention of postponing the acquisition until approval of the protester's product was completed, and then proceeded to complete approval of protester's product; protester will have opportunity to compete for requirement and thus was not competitively prejudiced by the delays.

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**Matter of: Newgard Industries, Inc.**

Newgard Industries, Inc., protests the delay in making award under, and subsequent cancellation of, request for proposals (RFP) No. F41608-88-R-0707, issued by the Department of the Air Force for three-man troop seats to be used in C-135 aircraft. We deny the protest.

The RFP, issued on February 26, 1988, was restricted to the known qualified sources, Oro Manufacturing Company and C.R. Daniel, Inc., but also permitted unapproved sources to submit proposals for qualification review. Three proposals were received by the March 26 closing date, one of which subsequently was withdrawn. The two remaining proposals were those of Oro, offering the ap-

proved equipment, and Newgard, offering an unapproved troop seat for qualification review and testing. Newgard's proposal was immediately forwarded to the review activity, even though Newgard had not submitted a detailed technical proposal from which the acceptability of its seat could be determined; it included information related to similar seats (two-man instead of three-man) Newgard previously had furnished. In response to an Air Force request, Newgard furnished the proper drawings in late April.

In late May, approval of Newgard's seat was withheld based on the agency's realization that the seat would have to be evaluated against Boeing Corporation data that was believed unavailable. Although the seat was by now in short supply, award was not made to Oro and in early August, after learning that the Boeing data should in fact be available to the agency through a preexisting agreement with Boeing, the agency asked that Newgard furnish a sample seat. Newgard did so, but as of early September the Air Force did not yet have the Boeing data. Later in September, the agency did get the data for evaluating Newgard's sample, but decided at this juncture that Newgard's seat should be subjected to the same approval requirements imposed on the other approved sources, including the furnishing of a test plan, prequalification testing, a test report, and flight testing. Newgard, advised of these requirements on October 24, furnished the test plan November 4, and submitted the test results December 2.

In November, the quantities of seats required was more than doubled. Based on this fact, the lengthy delay in award, and the likely approval of Newgard's seat in the near future (after a 30-day flight test), the Air Force decided that the RFP should be canceled due to the likelihood of greater competition and lower prices. The RFP was canceled by amendment dated December 21. We have been advised by the Air Force that Newgard's troop seat recently was approved.

Newgard concedes that contracting officials appear to have acted in good faith in trying to get its product approved, but nevertheless argues it improperly was denied a reasonable opportunity for approval here due to the agency's lack of even the most basic preparation—i.e., failure to obtain the Boeing data necessary for approval—and unwarranted delays. Newgard concludes that, had it not been for these failures on the agency's part, cancellation would have been unnecessary, and asks that it receive the award under the original RFP.

While we have sustained protests based on an agency's failure to provide for prompt qualification of an alternate source, *Pacific Sky Supply, Inc.*, 66 Comp. Gen. 370 (1987), 87-1 CPD ¶ 358, the facts here do not warrant such a result. As already explained, the Air Force canceled the solicitation here with the intention of postponing the acquisition until the qualification of Newgard's troop seat, and Newgard's seat now has in fact been approved. Since the prompt qualification requirement is designed to ensure that a capable offeror will not unreasonably be precluded from receiving an award, and Newgard will have an opportunity to compete for this award based on its newly qualified product, the firm has suffered no competitive prejudice that would warrant sustaining its protest.

Newgard does correctly point out that the cancellation will allow its competitors another chance to lower their prices now that they know Newgard is being considered. No offeror's proposed price or relative ranking has been disclosed in the course of this protest, however, and given that Newgard also has learned that Oro competed on the requirement, and will have the same opportunity to modify its offer in light of this information, we do not view the cancellation as giving any firm an unfair competitive advantage.

The protest is denied.

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**B-228187.4, B-228188.3, April 12, 1989**

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**Procurement**

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**Bid Protests**

**■ GAO procedures**

**■ ■ Preparation costs**

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**Procurement**

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**Competitive Negotiation**

**■ Offers**

**■ ■ Preparation costs**

Where protester's refusal to submit sufficient documentation supporting the amount of its claim for proposal preparation costs and the cost of filing and pursuing a protest effectively prevents the contracting agency from determining reasonableness of amount it ultimately will have to pay, General Accounting Office will not review the claim *de novo*.

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**Matter of: Patio Pools of Sierra Vista, Inc.—Claim for Costs**

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The Army Corps of Engineers requests that we determine the amount Patio Pools of Sierra Vista, Inc., is entitled to recover from the Corps for its proposal preparation costs and the cost of filing and pursuing its prior protest.

The Corps first issued solicitation No. AZ-87-33 (No. 33) on July 14, 1987, to satisfy an immediate requirement for office space at or in the vicinity of Sierra Vista, Arizona, to replace space destroyed by a fire at Fort Huachuca, Arizona. Without amending or canceling solicitation No. 33, the Corps issued solicitation No. AZ-87-34 (No. 34) on July 17, increasing the amount of space required. The protested lease ultimately was awarded under solicitation No. 34. Patio submitted proposals in response to both solicitations.

In our decision, *Patio Pools of Sierra Vista, Inc.*, B-228187, B-228188, Dec. 31, 1987, 87-2 CPD ¶ 650, we sustained the firm's protest against award of a lease under solicitation No. 34 because the Corps improperly eliminated Patio Pool's lower-priced proposal from consideration on the basis of factors—distance from the Fort, travel time and expense, and the costs of communications services and automatic data processing lines—that were not in the solicitation. We held that the firm was entitled to its proposal preparation costs and the cost of filing and pursuing the protest. We affirmed that holding in *Patio Pools of Sierra Vista*,

*Inc.— Reconsideration*, B-228187.2, B-228188.2, Apr. 7, 1988, 88-1 CPD ¶ 345. Patio now claims preparation costs related to the proposals it submitted in response to both solicitation Nos. 33 and 34, and protest costs.

Patio initially submitted a claim to the Corps of \$26,026, for labor (\$13,279), labor overhead (\$6,772), administrative overhead (\$3,609) and profit (\$2,366). The claim, submitted in the form of an invoice, requested payment of these amounts upon receipt by the government. No explanation or documentation in support of the amounts was provided. The Corps requested that Patio provide documentation in support of its claim, including the identity of the employees and the hours worked, time sheets and payroll records and any other relevant information to support its claim. The Corps states that despite two requests for documentation to substantiate its claim, Patio refused to provide any supporting documentation and the parties were unable to settle Patio's claim. The Corps therefore has requested that our Office determine the amount of entitlement pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1988).

We deny Patio's claim.

In order to settle the claim, we repeatedly requested that Patio provide our Office with a certified statement of its costs along with supporting documentation. We explained that in support of its claim for direct labor costs, Patio should provide the names of employees, documentation supporting their hourly rates, the number of hours worked and a description of the tasks performed. We also advised that time cards or payroll records should be provided, if available. In addition, we requested a breakdown of overhead costs and supporting documentation including utility and other related bills for the period involved.

In response, Patio submitted a claim for \$22,806.51, which includes \$12,799.70 for direct labor costs; \$6,527.85 for labor overhead (51 percent of direct labor costs); and \$3,478.96 for administrative overhead (direct labor costs plus labor overhead multiplied by an 18 percent overhead rate). In support of its claim for direct labor costs, Patio provided a 1-1/2 page list with the following headings: date, description, man-hour units, amount and total. The descriptions of the expenditures are very brief, and the list does not provide the identity of employees, or the hours worked and tasks performed by each employee; nor has Patio provided any documentation supporting the hourly rates or the overhead rates. Despite repeated requests from our Office, Patio failed to provide any further documentation in support of its claim.

The Corps reviewed the claim submitted to our Office and recommends that the entire claim be denied because Patio has neither reasonably explained the costs nor provided verification that the costs were actually incurred either in preparing its proposals or in pursuing its protest. We agree.

A protester seeking to recover its bid or proposal preparation costs or the cost of pursuing its protest must submit sufficient evidence to support its monetary claim. *Malco Plastics*, B-219886.3, Aug. 18, 1986, 86-2 CPD ¶ 193. The amount claimed may be recovered to the extent that the claim is adequately documented and is shown to be reasonable. *Fischer-White-Rankin Contractors, Inc.*,

B-213401.3, July 22, 1986, 86-2 CPD ¶ 88. A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the preparation of its bid or proposal or in the pursuit of its protest. See Federal Acquisition Regulation § 31.201-3(a).

Here, the claim Patio submitted to the Corps consisted solely of a list of lump sum figures (entitled labor, labor overhead, administrative overhead, and profit) representing the costs for which Patio claims reimbursement. Patio's refusal to submit any documentation to the Corps in support of the amounts claimed effectively prevented the Corps from reviewing the reasonableness of the amount it ultimately would have to pay. We do not think it is appropriate for our Office to review a claim *de novo* when, as here, an uncooperative protester in effect deprives the contracting agency of a meaningful opportunity to review the claim, and in the future we will not review protesters' claims in these circumstances.

In any event, based on our review of the information submitted to our Office, we deny the claim since Patio clearly has not submitted sufficient support for the types of costs and amounts claimed. As noted above, Patio submitted only a brief list of costs to which it claims entitlement without explanation or documentation of the nature of the costs or their amount, despite repeated requests and explanations by our Office as to the documentation required. We recognize that Patio incurred some costs in preparing its proposal and pursuing the protest. Nevertheless, we do not think that a protester's recovery of such costs should be based on speculation by our Office as to the reasonableness of the claim, as would be the case here given Patio's failure to provide documentation for its claim.

The claim is denied.

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## **B-231024, April 12, 1989**

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### **Civilian Personnel**

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#### **Compensation**

##### **■ Overtime**

##### **■ ■ Eligibility**

##### **■ ■ ■ Advance approval**

An employee who performed and was paid for overtime work during a 4-month period claims overtime for another 4 months after his supervisor indicated he should no longer request payment for overtime. The employee may not be paid overtime under 5 U.S.C. § 5542 (1982) during the second 4-month period. Such overtime was not ordered or approved and there was no inducement on the part of the supervisor for the employee to continue to perform overtime work.

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### **Matter of: Ronald L. Barnhart—Overtime Compensation**

Mr. Ronald L. Barnhart, an employee of the Department of the Army, appeals the settlement issued by our Claims Group denying his claim for overtime com-



pensation.<sup>1</sup> For the reasons stated later in this decision, we sustain the disallowance of Mr. Barnhart's claim.

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## Background

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Mr. Barnhart requests payment for 98 hours of overtime work performed from June 18 through October 23, 1985. Mr. Barnhart states that he was paid for 106 hours of overtime performed during the period from February 23 through June 15, 1985, and that he then received a note from his supervisor, Lieutenant Colonel T. D. Manula, which read: "Ron, What am I getting for my money? Why should I pay overtime to a dedicated supervisor? (who is looking for promotion) TDM." Mr. Barnhart states that based upon this note and a request by Colonel Manula for him not to seek payment for overtime, he stopped submitting requests for overtime pay but continued to document the hours of overtime he worked.

Mr. Barnhart states that there was never anything in writing authorizing him to be paid for the 106 hours he previously worked. Nevertheless, he says there was an understanding between him and Colonel Manula that overtime work was needed to accomplish the workload of the Contract Management Division. Mr. Barnhart says that when he received the note from Colonel Manula, referred to earlier, the message conveyed to him was that if he did what was expected of him, he would receive the promotion to Chief, Contract Management Division, GM-13. Since he did not later receive the promotion, he decided that he should at least be paid for the overtime work he performed.

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## Opinion

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Under the provisions of 5 U.S.C. § 5542 (1982), overtime must be paid when an official with competent authority orders or approves hours of work in excess of 40 hours in an administrative workweek or in excess of 8 hours in a day. Therefore, the determinative issue presented is whether the work for which Mr. Barnhart seeks overtime compensation was work officially ordered or approved within the meaning of section 5542.

The standards to be utilized in determining whether overtime work was properly ordered or approved have been set forth by the United States Claims Court in *Baylor v. United States*, 198 Ct. Cl. 331 (1972). The court in *Baylor* examined a range of situations from a regulation specifically requiring overtime to the situation where there is only a "tacit expectation" that overtime is to be performed, and the court indicated that such a tacit expectation does not constitute an official order or approval of the overtime. Based on *Baylor*, we have held that only where there is "more than a tacit expectation" that overtime be performed or employees have been "induced" by their supervisors to perform overtime work in order to effectively complete their assignments will overtime work be deemed

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<sup>1</sup> Z-2790986, Jan. 28, 1988.

to have been officially ordered or approved. *See* 53 Comp. Gen. 489 (1974); *Carl L. Haggins*, B-216952, Oct. 18, 1985; *Jim L. Hudson*, B-182180, Jan. 6, 1982; *Bordenkircher and Jew*, B-188089, Oct. 31, 1977.

In this case, the record shows that Colonel Manula did not affirmatively order or approve overtime for Mr. Barnhart after June 15, 1985. Nor do we believe that the note constituted an inducement to Mr. Barnhart to work overtime. While the language of the note may be ambiguous in some respects, it is quite clear in stating that overtime would no longer be paid. We are not prepared to interpret the remainder of the note as, at the same time, calling on Mr. Barnhart to work overtime without compensation.

Accordingly, we sustain our Claims Group's determination denying overtime compensation in this case.

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## **B-234030, April 17, 1989**

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### **Procurement**

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#### **Sealed Bidding**

##### **■ Contract awards**

##### **■ ■ Propriety**

##### **■ ■ ■ Evaluation criteria**

##### **■ ■ ■ ■ Defects**

Solicitation is defective where it lists eight evaluation factors, including price, in descending order of importance when in fact non-price factors were intended to be used only to determine whether the offerors were technically acceptable, not as the basis for a relative evaluation of the offerors' technical merit, and contracting agency in fact intended to award to the lowest priced technically acceptable offeror. Nevertheless, agency properly may make award under the defective solicitation since there is no indication that any offeror was prejudiced by the defect and the awardee's product meets the agency's needs.

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### **Matter of: Cenci Powder Products, Inc.**

Cenci Powder Products, Inc., protests the decision of the Department of Veterans Affairs (VA) to reopen negotiations after having awarded Cenci a contract under request for proposals (RFP) No. M5-Q324-88, issued as a total small business set-aside to supply bulk laxatives to three VA locations on a requirements basis. We sustain the protest.

The RFP provided that proposals would be evaluated against eight criteria, listed in descending order of importance as follows:

1. Manufacturing facility is in compliance with Food and Drug Administration GCMP regulations.
2. Food and Drug Administration has issued an approval NDA/ANDA for the product.
3. Price.
4. Visual inspection of product (if required).
5. Shelf life.

6. Past performance.
7. Delivery schedule.
8. Full product line can be supplied.

VA received six offers with both Cenci and Lafayette Pharmacal, Inc., submitting the lowest unit price of \$1.39. The contracting officer reviewed the offers and in an effort to resolve the price tie requested that Lafayette and Cenci submit best and final offers. When both firms responded without changing their offers the contracting officer awarded the contract to Cenci on August 9, 1988, because Cenci, unlike Lafayette, would perform in a labor surplus area. *See Federal Acquisition Regulation § 14.407-6(a)(1)* (tie bids are to be broken by awarding to bidder which is also a labor surplus area concern).

On August 10, Lafayette protested to the contracting officer that the award to Cenci was improper. The contracting officer denied the protest by letter dated October 13. On October 20, Lafayette appealed the decision of the contracting officer to the director of VA's Office of Acquisition and Materiel Management. In reviewing the protest, the director concluded that the award to Cenci was improper because in making the award decision the contracting officer ignored all the evaluation criteria set out in the RFP except price. The director instructed the contracting officer to reopen the procurement, evaluate the proposals in accordance with the stated criteria, hold discussions and award to the highest rated offeror. On December 14, the contracting officer issued Amendment 1 to implement the director's instruction. The amendment revised the RFP to include only four of the eight original evaluation criteria (price, visual inspection of the product, shelf life and delivery schedule); required submission of bid samples; and called for revised offers by December 30.

Subsequently, Cenci protested to our Office that because prices have been exposed, VA's decision to reopen discussions will result in an auction and thus is improper. Cenci also disputes VA's contention that the contracting officer failed to consider all of the evaluation factors stated in the RFP in connection with the initial decision to award to Cenci.

While procuring agencies have broad discretion in determining the evaluation plan they will use, they do not have the discretion to announce in the solicitation that one plan will be used and then follow another in the actual evaluation. Once offerors are informed of the criteria against which their proposals will be evaluated, the agency must adhere to those criteria or inform all offerors of any significant changes made in the evaluation scheme. *Greenebaum and Rose Assocs.*, B-227807, Aug. 31, 1987, 87-2 CPD ¶ 212. Here, while we agree that the record does not demonstrate that the seven evaluation factors, other than price, set out in the RFP were evaluated, we do not find that issue dispositive of the protest. Rather, as discussed below, the solicitation itself was defective.

As the VA states, it issued the solicitation with evaluation criteria that were either unnecessary or irrelevant and accordingly later deleted four of the eight original criteria when it issued Amendment 1. More important, while the RFP

purported to list them in descending order of importance, the evaluation factors, with the exception of past performance, are objective factors which an offeror either does or does not meet. They do not lend themselves to use in an evaluation of offerors' relative merit, and there is no indication as to how VA intended to apply the factors on a comparative basis to determine the technically superior offeror.

Concerning past performance, this is a traditional responsibility factor which may be used as a technical evaluation factor where the agency's needs warrant a comparative evaluation of the offerors' past performance. *See Sanford and Sons Co.*, 67 Comp. Gen. 612, 88-2 CPD ¶ 266. Here, however, since VA ultimately deleted past performance from the evaluation scheme in the solicitation, it is clear that VA did not intend to use it in a comparative evaluation of the offers it received. As a result, past performance was improperly listed as a technical evaluation factor.

Finally, the fact that Amendment 1 to the RFP deleted any reference to the relative weights of the evaluation factors confirms our view that VA intended that award be made on the basis of price among those offerors found acceptable under the three technical factors (delivery schedule, shelf life and visual inspection) retained in the amended RFP. Thus, to the extent that the RFP stated that award would be based on evaluation of the relative merits of the offerors, rather than on the lowest priced technically acceptable offer, the RFP was defective.

While we agree that the RFP was defective, the defect is not one which warrants terminating the award to Cenci and reopening the competition after prices have been exposed, given that there is no indication that Lafayette was prejudiced by the defective solicitation. *See AT&T Communications*, 65 Comp. Gen. 412 (1986), 86-1 CPD ¶ 247. In this regard, Lafayette's proposal was evaluated on the same basis as Cenci's proposal and the contracting officer found both proposals equal in all respects. Further, we have no reason to believe that Lafayette would have changed its offer, with regard to either price or the product offered, if it had been clear that award would be made to the lowest-priced technically acceptable offeror. Finally, the record shows that Cenci met the required delivery schedule and its product had the required shelf life, and thus, award to Cenci will meet VA's needs.

Given that the only reason offered by VA for terminating Cenci's contract and reopening the competition was its failure to follow the original evaluation scheme, which we have found defective; there is no indication that any offeror was prejudiced by the initial evaluation; award under the original RFP will meet VA's needs; and reopening the competition would simply promote an auction among the offerors without any corresponding benefit to the procurement system, we find that terminating the award and reopening the competition was not justified. Accordingly, if after VA performs the visual inspection on the product offered by Cenci, the product proves acceptable, VA should reinstate the award to Cenci. We also find that Cenci is entitled to recover the costs it

incurred in filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1988).

The protest is sustained.

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**B-229990.3, April 19, 1989**

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**Procurement**

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**Socio-Economic Policies**

■ **Small businesses**

■ ■ **Competency certification**

■ ■ ■ **Reconsideration**

■ ■ ■ ■ **Additional information**

There is no legal requirement that the contracting agency request Small Business Administration (SBA) reconsideration of a nonresponsibility determination where, following determination that bidder is nonresponsible and SBA declination to issue certificate of competency, the contracting officer reconsiders the nonresponsibility determination in light of new information submitted by bidder and reasonably determines that reversal of the nonresponsibility determination is not warranted.

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**Matter of: Marlow Services, Inc.**

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Marlow Services, Inc., protests the Department of the Army's failure to refer the agency's affirmation of its initial nonresponsibility determination regarding Marlow under invitation for bids (IFB) No. DAKF24-88-B-0001, to the Small Business Administration (SBA) for a second certificate of competency (COC) review. The solicitation, a small disadvantaged business set-aside, was issued by Fort Polk, Louisiana, for a full food service (FFS) and dining facility attendant (DFA) services contract for a base period and two 1-year option periods. The proposed contract would require the contractor to furnish DFA services at 10 dining facilities, 3 of which have 2 dining areas, and FFS at specified locations.

We deny the protest.

Fifteen bids were received by the June 3, 1988, bid opening date. Marlow became the apparent low bidder after correction of a mistake increased the lowest bid. The contracting officer, however, found Marlow nonresponsible based upon a negative pre-award survey which indicated that Marlow did not have the financial resources and experience to perform the required services, and the contracting officer's own assessment that Marlow's bid, considerably lower than the government's estimate, evidenced a lack of understanding of contract requirements. The nonresponsibility determination was referred to SBA for review under the COC procedures pursuant to the Small Business Act, 15 U.S.C. § 637(b)(7) (1982). On September 30, SBA declined to issue a COC because Marlow failed to demonstrate that it had the financial resources necessary to implement contract performance.

In an October 3 letter to the agency protesting award to any other bidder, Marlow attempted to show that it had the financial resources necessary for con-

tract performance. The contracting officer, responding in an October 11 letter, refused to reconsider the nonresponsibility determination, stating that the determination was not based on financial capacity alone, but on Marlow's failure to understand contract requirements and its performance history as well. The contracting officer also advised Marlow that the firm's request for reconsideration should be sent to the SBA.

Subsequently, on November 23, Marlow informed the contracting officer of a \$250,000 loan that had been approved by the Louisiana Economic Development Corporation (LEDC) and again requested that the contract be awarded to it. The contracting officer refused, advising the protester, on November 28, that the nonresponsibility determination would not be reconsidered.

Marlow also informed SBA of the LEDC loan and requested that a COC be issued to its firm. SBA declined, in a December 2 letter to Marlow, stating that its prior decision not to issue a COC was a final ruling and that it was the contracting officer's prerogative to resubmit Marlow's case to SBA.

On December 9, Marlow filed a protest with our Office, contending that its firm was entitled to contract award as the low bidder. We summarily dismissed the protest because the record indicated that the firm had been denied a COC by SBA and our Office generally does not review SBA's COC decisions. *See Bid Protest Regulations*, 4 C.F.R. § 21.3(m)(3) (1988).

Concurrently, Marlow also requested that the Army refer its case back to SBA for a second COC review. The Army denied the request on December 21, stating that the agency's decision not to reconsider the firm's nonresponsibility determination would not change.

On December 19, prior to receiving the Army's negative response to its request for SBA referral, Marlow filed this protest with our Office, objecting to the Army's failure to grant SBA additional time to reconsider the firm's responsibility in light of the \$250,000 loan.

On January 30, 1989, while Marlow's current protest was pending in our Office, and notwithstanding the agency's repeated statements to the contrary, the contracting officer reconsidered the initial nonresponsibility determination. Based on a review of the terms of the \$250,000 loan and other information, the contracting officer affirmed the initial determination. The contracting officer also determined that it was not in the government's best interest to refer the affirmation of Marlow's nonresponsibility determination to SBA for a second COC review.

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#### **Reconsideration Of Nonresponsibility Determination**

Marlow contends that the contracting officer's reconsideration of the nonresponsibility determination was improper and unreasonable. In support of its contention, Marlow alleges that the contracting officer only reluctantly undertook the review at the last minute; that the scope of review should have been limited to Marlow's financial resources since SBA, by declining to issue the COC on finan-

cial grounds only, implicitly overruled the agency on the other two grounds relating to the firm's capacity—understanding contract requirements and performance history; and that the contracting officer failed to notify Marlow of his decision to conduct the reconsideration and did not allow Marlow the opportunity to submit additional information with regard to the firm's financial resources.

In response, the contracting officer disputes that the reconsideration of Marlow's nonresponsibility was a perfunctory review, stating that the reconsideration was based upon the information that was used to make the original nonresponsibility determination; the documents Marlow provided SBA for COC review, many of which had not been previously considered by the Army, and other information. The contracting officer also states that the information reviewed did not reflect any improvement in Marlow's failure to provide the minimum staffing or necessary supplies and equipment; to show a performance history that could resolve the agency's concern regarding Marlow's ability to handle a contract of this type and magnitude; and to show that the necessary finances were available to perform the contract.

Under the Small Business Act, 15 U.S.C. § 637(b)(7), no small business may be precluded from the award of a contract based solely on a contracting officer's nonresponsibility determination without referral of the matter to SBA for a COC review. The SBA has conclusive authority to review a contracting officer's negative determination of responsibility and to determine a small business bidder's responsibility by issuing or declining to issue a COC. 15 U.S.C. § 637(b)(7)(A); *Eagle Bob Tail Tractors, Inc.*, B-232346.2, Jan. 4, 1989, 89-1 CPD ¶ 5. However, where new information probative of a small business concern's responsibility comes to light for the first time prior to contract award, the contracting officer may reconsider a nonresponsibility determination even though SBA already may have declined to issue a COC. *Reuben Garment International Co., Inc.*, B-198923, Sept. 11, 1980, 80-2 CPD ¶ 191.

In this case, the Army chose to reassess Marlow's nonresponsibility determination in light of the new information. Our review in these circumstances is limited to determining whether the contracting agency's reassessment was reasonable. *Eagle Bob Tail Tractors, Inc.*, B-232346.2, *supra*. In this regard, the record indicates that the agency's reconsideration of Marlow's responsibility in light of the new information was reasonable. Basically, the contracting officer affirmed the initial nonresponsibility determination because Marlow failed to refute the negative findings regarding understanding the contract requirements, performance history, and financial capacity cited in the initial determination.

As a preliminary matter, Marlow contends that the contracting officer's review of the nonresponsibility determination should have been limited to financial resources because SBA overruled the agency on the two other grounds relating to the firm's capacity.

In this regard, SBA states that although SBA may consider all areas of responsibility during a COC review, there is no statute, regulation or informal proce-

dures which requires that the COC Review Committee consider additional grounds for referral after it has already decided to deny the COC on one ground. In this case, SBA states that the minutes of the committee's meeting on Marlow's application show that the committee did not vote on the other two grounds for the referral—Marlow's failure to understand contract requirements and performance history—once it had decided to deny the COC on financial grounds. Thus, SBA states, even though the letter denying the COC cites only one of the grounds for referral, there is no basis for concluding that SBA reached a favorable result on any of the other grounds. In our view, since the record shows that SBA's decision was based on Marlow's financial capability, Marlow's contention that SBA overruled the agency on the other two grounds is without merit.

In any event, even if the contracting officer's review were limited to the financial resources area, the record shows that he reasonably determined that Marlow lacked the financial capacity to perform the contract. Specifically, the contracting officer determined that the \$250,000 loan had not been disbursed to Marlow and was contingent upon LEDC's verification of the collateral securing the loan and approval of repayment terms which had yet to be specified. The contracting officer noted that if the contract were to be awarded and Marlow cannot meet the conditions for the disbursement of the loan funds, the contract will have been awarded to a contractor without adequate financial resources to meet contract requirements. Additionally, since the agency was notified that Marlow's checks for supplies and insurance had been rejected by a financial institution due to insufficient funds, the contracting officer reasonably doubted Marlow's ability to obtain adequate financial resources.

In its comments, Marlow does not refute the agency's statement regarding the two checks that were not honored by the financial institution. Further, while the protester asserts that the contracting officer, in bad faith, did not conduct a full review of its financial capabilities, Marlow does not specify which "financial capabilities," other than the loan and other information already considered, the contracting officer failed to review. With regard to the three conditions applicable to the \$250,000 loan, Marlow contends that the conditions reflect the normal business policies of financial institutions, but fails to provide any evidence supporting its contention. Under the circumstances, we have no basis for concluding that the agency's assessment of the protester's financial capacity was unreasonable.

As noted above, the initial nonresponsibility determination also was based on concerns about Marlow's understanding of the contract requirements and its performance history. In reconsidering the initial determination, the contracting officer reexamined his conclusions in these two areas as well. With regard to understanding the contract requirements, the contracting officer again found that Marlow's estimate of 158,395 staffing hours for DFA services per year was below the minimum of 162,335 DFA staffing hours required by the contract; that the 8,385 hours for FFS was considerably below the government estimate of 14,368 hours; and that the estimate of the value of supplies required for con-



tract performance was \$18,733, or \$89,267 less than the government estimate of \$108,000.

Marlow argues that the contracting officer's assessment of the shortage in staffing hours, which the agency estimated converts into a dollar shortage of \$25,374, totally disregards Marlow's previous submission of proof that income to support contract performance would be enhanced by Job Training Partnership Act (JTPA) training funds and union orientation funds.

The record indicates that Marlow anticipates using participants in the JTPA Dislocated Worker Program in the performance of the contract. Presumably, using participants in this program may generate savings in terms of staffing costs; however, there is no evidence in the record that JTPA or union orientation funds will actually be provided to the firm, as Marlow states. In any event, we fail to see the relevance of Marlow's argument because the dollar shortage calculated by the Army merely represents the disparity in staff hours between Marlow's and the Army's estimate. In order to assist prospective bidders, the IFB clearly set forth the estimated minimum hours per day per dining facility for DFA services. Notwithstanding this guidance, Marlow's estimate was 3,940 hours below the government's estimate. In view of Marlow's low estimate, we find that the contracting officer was justifiably concerned that Marlow did not fully understand the contract requirements.

With respect to FFS, Marlow argues that since the solicitation did not specify minimum staffing needs, the agency cannot now question the firm's proposed staffing for these services unless the firm's estimate is deficient on its face.

While the IFB did not specify the minimum staffing hours required for FFS, it did require that the contractor provide all resources necessary for FFS. To aid prospective bidders in this regard, the IFB included six pages of detailed information on the estimated workload at one location, including the total number of days of operation, seating capacity, number and type of serving lines, and a projection of the estimated number of persons to be served, by meal period (breakfast, lunch, dinner), for the contract base period and 2 option years. The IFB also stated that FFS would be provided for 200 persons per meal at 3 other dining facilities.

The agency reaffirmed its finding that Marlow's estimate of 8,384 staffing hours for FFS was considerably below the government estimate of 14,368 hours and that based on Marlow's average hourly wage of \$11.05, this represented a \$66,123 cost difference in the agency's and Marlow's estimates (\$158,766 less \$92,635). In view of the amount of information that was provided on FFS, and given the fact that Marlow's estimate was only 58 percent of the government's estimate, we find that the contracting officer's concern about Marlow's understanding of the requirements in this area was reasonable.

With respect to the value of supplies required for contract performance, the IFB specified the types and amounts of supplies required, by facility. In this area too, the agency reasonably found that Marlow's estimate of \$18,733 evidenced a

lack of understanding of contract requirements since it was substantially below the government's estimate of \$108,000.

Finally, with regard to Marlow's performance history, the record supports the contracting officer's conclusion that the firm lacks the experience for a contract of this magnitude. For example, in an attachment to its bid, Marlow listed five food service contracts, three of which are contracts, valued from \$900 to \$1,200, for catering services for one evening; the fourth contract, for \$32,000, was for FFS at a club; and the fifth, a \$78,000 contract was for FFS and DFA services for an American Legion Post. Marlow's bid for the protested contract, which was deemed too low at approximately \$4,650,000, represents, in dollar terms, a significant departure from the firm's earlier FFS contracts. In view of the above, the contracting officer was justifiably concerned that the firm lacked the prior experience necessary for performance of the contract.

Based on the above, we conclude that the agency reasonably assessed the new information regarding Marlow's finances in its reconsideration of the initial nonresponsibility determination, and reasonably decided to allow that determination to stand.

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#### Referral to SBA

With regard to referral of the contracting officer's affirmation of Marlow's nonresponsibility to SBA, we have held that where the contracting agency has reassessed the bidder's responsibility in light of new information and has determined that the information either was substantially the same as previously considered or, if not previously considered, did not materially alter the initial nonresponsibility determination (and accordingly did not warrant reversal of the initial determination), the contracting officer is not legally required to refer the matter to SBA for a second COC review. *Eagle Bob Tail Tractors, Inc.*, B-232346.2, *supra*.

Marlow contends, however, that our Office should review the agency's refusal not to refer the matter back to SBA because the contracting officer acted in bad faith. Specifically, Marlow alleges that the agency orally had promised to refer its case back to SBA if its firm submitted additional financial information, but that when information on the \$250,000 loan was submitted, the agency declined to review the nonresponsibility determination. Additionally, the protester alleges that the agency knew that SBA had no authority to request agency referral of Marlow's case, yet continually stated that it would grant SBA additional time for evaluation of Marlow's case if SBA requested it.

In response, the Army denies that it promised to resubmit Marlow's case to SBA and states that the correspondence between Marlow and the Army shows that the Army consistently stated that it would not refer the matter to SBA. The Army further states that given that all newly submitted information was evaluated and the nonresponsibility determination was reconsidered, the protester suffered no harm even if conflicting information regarding referral to SBA had been provided to Marlow.

In order to show bad faith, a protester must submit evidence that the contracting agency acted with specific and malicious intent to injure the protester. *O'GaraHess & Eisenhardt Armoring Co.—Reconsideration*, B-232508.2, Sept. 29, 1988, 88-2 CPD ¶ 302. Using that standard, we find no evidence of bad faith in the record here.

Although Marlow contends that the Army orally promised to resubmit the non-responsibility determination to SBA if the firm submitted new information on its finances, the protester has provided no evidence supporting the allegation. In fact, the record indicates that the Army consistently maintained that the non-responsibility determination would not be reconsidered in letters dated October 11, November 28 and December 21. The Army's October 11 letter, stating that the agency would look favorably upon an SBA request for additional time to consider Marlow's case, may have given the protester the impression that SBA had the prerogative to reopen the case. However, that impression should have been dispelled by SBA's December 2 letter, which advised Marlow that it was the prerogative of the contracting officer to direct the case to SBA if he determines that the referral is in the government's best interest and there is time to hold up the procurement for an additional 15 days. While there may have been a conflict in the advice provided by the two agencies with regard to SBA referral, that is not enough to support a finding of bad faith, since there is no evidence in the record that the Army or SBA acted with a specific and malicious intent to injure the protester. In any event, the agency did eventually consider the new information and reasonably found that a reversal of the nonresponsibility determination was not warranted.

Given our finding that the agency's reconsideration was reasonable, and the lack of any indication that the contracting officer's determination that it was not in the government's best interest to refer the affirmation of Marlow's non-responsibility to SBA was made in bad faith, we see no basis to require the Army to refer Marlow's case to SBA for a second COC review.

The protest is denied.

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**B-234290, April 20, 1989**

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**Procurement**

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**Contractor Qualification**

■ **Responsibility/responsiveness distinctions**

■ ■ **Sureties**

■ ■ ■ **Financial capacity**

Bid is responsive despite individual surety's failure to file pledge of assets with bid bond since a pledge of assets is information which bears on responsibility and, as such, may be furnished any time prior to award.

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## **Procurement**

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### **Sealed Bidding**

- Bid guarantees
- ■ Responsiveness
- ■ ■ Signatures
- ■ ■ ■ Omission

Failure of a bidder to sign a bid bond in the capacity of principal constitutes a minor informality that can be waived where the unsigned bond is submitted with a signed bid.

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## **Procurement**

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### **Sealed Bidding**

- Bid guarantees
- ■ Responsiveness
- ■ ■ Signatures
- ■ ■ ■ Authority

The validity of a bid is not affected by the bidder's failure to affix a corporate seal to the bid or the bid bond.

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## **Procurement**

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### **Contractor Qualification**

- Responsibility/responsiveness distinctions
- ■ Sureties
- ■ ■ Financial capacity

Alleged defects in affidavit of individual surety submitted with bid bond do not affect responsiveness of bid since affidavit serves only to assist the contracting officer in determining the surety's responsibility.

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## **Matter of: Noslot Pest Control, Inc.**

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Noslot Pest Control, Inc., protests the award of a contract to any other bidder under invitation for bids (IFB) No. GS-11P-89MJC0015, issued by the General Services Administration (GSA) for custodial services. Noslot, the fourth lowest bidder, contends that the three low bids should have been rejected as nonresponsive and thus that it is entitled to the award.

We deny the protest.

The IFB required the bidders to furnish a bid guarantee in an amount equal to 20 percent of the bid. The three low bidders, Trans-Atlantic Industries Inc., Complete Building Services, Inc., and Eastern Environmental Services, submitted bonds in the requisite amounts, each listing two individual sureties. All of the sureties completed their respective affidavits of individual surety, Standard Form (SF) 28, as required by the solicitation; however, none of the individual sureties complied with the solicitation requirement to submit a pledge of assets in the form of evidence of an escrow account containing commercial and/or government securities and/or a recorded covenant not to convey or encumber real estate.

Noslot first argues that the bids are nonresponsive based on the sureties' failure to submit pledges of assets. GSA disagrees, arguing that the issue of whether or not a pledge of assets has been submitted by a bidder is a question of responsibility that may be resolved any time prior to award, rather than, as Noslot argues, a question of responsiveness which must be determined from a facial examination of the bid package at bid opening. We agree.

The purpose of a bid guarantee is to secure the liability of a surety to the government in the event that the bidder fails to fulfill its obligation to execute a written contract. The sufficiency, and thus the responsiveness, of a bid guarantee depends on whether a surety is clearly bound by its terms. *O.V. Campbell & Sons Industries, Inc.*, B-229555, Mar. 14, 1988, 88-1 CPD ¶ 259. The failure to submit a surety's pledge of assets with the bid, however, in no way affects the individual surety's liability. In fact, a pledge of assets serves only one purpose: it assists the contracting officer in determining the financial acceptability of the individual surety, which itself is a matter of responsibility, not responsiveness. See *Aceves Construction and Maintenance, Inc.*, B-233027, Jan. 4, 1989, 89-1 CPD ¶ 7. Thus, even though the IFB required a pledge of assets from each individual surety, since the pledges contain information bearing on responsibility, they may be provided any time prior to award. See *American Construction*, B-213199, July 24, 1984, 84-2 CPD ¶ 95.

Noslot also argues that even though the principals of Trans-Atlantic and Complete signed their bids, the bids are nonetheless nonresponsive because the principals did not sign their respective bonds, as required by the instructions on the standard bond form. Even though the instructions require the principal's signature on the bond, we do not regard the signature as a material requirement with which the bidder must comply in order to be responsive where, as here, the unsigned bond is submitted with a signed bid. See *P-B Engineering Co.*, B-229739, Jan. 25, 1988, 88-1 CPD ¶ 71. Since the bidder is already obligated under the bid and the failure to sign would not affect the sureties' obligation to the government, GSA was not required to reject Trans-Atlantic's and Complete's bids as nonresponsive on this basis.

The protester also contends that the bids submitted by Eastern and Complete are nonresponsive because the firms failed to affix corporate seals to their respective "signature pages." We find this argument to be without merit. The absence of corporate seals from the bid or bid bond does not make the bids nonresponsive since evidence of a signer's authority to bind the bidding company may be furnished after bid opening. *West Georgia Industrial Piping and Plumbing Inc.*, B-227754, Sept. 22, 1987, 87-2 CPD ¶ 289. In any event, Eastern is a partnership and, as such, does not have to place a corporate seal on its bid bond.

Finally, the protester contends that the three low bids are nonresponsive because the affidavits submitted by the sureties contained several defects. For example, Noslot states that each bidder used sureties who are husband and wife, and who both listed the same personal residence as a solely-owned asset. Like the other grounds of this protest, we find this argument to be without merit. Since each of the sureties properly executed a bid bond in a sufficient amount

and submitted an affidavit showing a net worth in excess of the amount of the bond, and there are no other obvious defects detracting from the sureties' liability on the bonds, the bonds on their face are acceptable. Whether the assets listed in the sureties' affidavits are acceptable and sufficient to support the bonds is a matter of responsibility, and does not affect the responsiveness of the bids. *See Hispanic Maintenance Services*, B-218199, Apr. 22, 1985, 85-1 CPD ¶ 461; *Fitts Construction Co.*, 62 Comp. Gen. 615, (1983), 83-2 CPD ¶ 190.

The protest is denied.

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## **B-232858, April 21, 1989**

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### **Civilian Personnel**

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#### **Travel**

##### **■ Travel expenses**

##### **■ ■ Fraud**

##### **■ ■ ■ Effects**

Four employees admitted providing false information on travel vouchers for the cost of meals and incidental expenses incurred while on temporary duty. Where any subsistence item shown on a voucher for a particular day is fraudulent, the finding taints the entire per diem or actual expenses for that day. Thus, lodging claims for the same days of duty may not be paid. 60 Comp. Gen. 357 (1981), amplified.

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### **Matter of: Defense Logistics Agency—Fraudulent Meal Claims**

Four civilian employees of the Defense Logistics Agency admitted providing false information concerning meals and incidental expenses on vouchers they submitted relating to temporary duty travel in connection with computer training in June 1983. As a result of the agency's investigation, the employees were reprimanded. They presented claims for lodging, supported by apparently valid receipts, relating to the same days of temporary duty. The agency disallowed the lodging claims based on the applicable regulation which provides that where an employee falsifies a claimed expense for lodging, meals or incidentals, the per diem or actual expense allowance will be denied for the entire day on which the falsified expense is claimed. *See Joint Travel Regulations*, vol. 2, para. C4352 (Change No. 234, April 1, 1985). The employees requested that the claims be submitted to this Office for decision.<sup>1</sup>

We agree with the agency's determination. Where an employee submits a travel voucher on which claims for subsistence expenses are based on fraud, each day constitutes a separate item of expenses and is considered separately. A fraudulent statement for any subsistence expense taints the entire subsistence claim for that day. Thus, for those days for which fraudulent lodging or meal information is submitted, the entire claim for subsistence must be denied. 60 Comp.

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<sup>1</sup> This matter was assigned Control No. 88-15 by the Per Diem, Travel and Transportation Allowance Committee.

Gen. 357 (1981), reconsidered and amplified, 61 Comp. Gen. 399 (1982); 57 Comp. Gen. 664 (1978). *See also* B-207992, Dec. 21, 1982.

In this case, since the employees' daily itemizations for meals and incidental expenses were admittedly and deliberately misstated, the lodging claims for those days must be denied. *See* B-219217, Jan. 21, 1986; B-212354, Aug. 31, 1983.

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## **B-228052.5, April 24, 1989**

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### **Procurement**

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#### **Bid Protests**

- GAO procedures
- ■ Preparation costs
- ■ ■ Attorney fees
- ■ ■ ■ Amount determination

Attorneys' fees claimed by prevailing protester are determined reasonable, and thus are allowable, where the hourly rates are within bounds of rates charged by similarly situated attorneys, and the hours claimed are properly documented and do not appear to be excessive.

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### **Procurement**

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#### **Bid Protests**

- GAO procedures
- ■ Preparation costs

Claimant is entitled to recover incurred company costs of filing and pursuing General Accounting Office protest, but not agency-level protest where costs claimed were sufficiently documented and agency did not articulate a reasoned analysis for the rejection of specific hours or show the costs to be otherwise unreasonable.

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### **Procurement**

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#### **Competitive Negotiation**

- Offers
- ■ Preparation costs

Claimant is entitled to recover proposal preparation costs which are adequately documented and shown to be allocable to the subject procurement.

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### **Procurement**

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#### **Bid Protests**

- GAO procedures
- ■ Preparation costs
- ■ ■ Attorney fees

Request for payment of costs associated with pursuing claim for recovery of attorneys' fees and costs of filing and pursuing protest are denied since such costs are not recoverable in the absence of express statutory or contractual authority.

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## Matter of: Princeton Gamma-Tech, Inc.—Claim for Costs

Princeton Gamma-Tech, Inc. (PGT), requests that the General Accounting Office (GAO) determine the amount it is entitled to recover from the United States Marshals Service for proposal preparation and filing and pursuing its prior protest. In *Princeton Gamma-Tech, Inc.*, B-228052.2, Feb. 17, 1988, 88-1 CPD ¶ 175, we sustained PGT's protest, filed October 6, 1987, that the agency improperly evaluated the firm's and the awardee's proposals, and also failed to conduct meaningful negotiations under request for proposals (RFP) No. 87-7054, for walk-through metal detectors. We also determined that PGT was entitled to recover its proposal preparation costs and the costs of filing and pursuing the protest. PGT has requested reimbursement in the amount of \$61,391.06, consisting of \$17,134.25 in attorneys' fees, \$151.81 in out-of-pocket attorneys' expenses, \$29,773 in costs incurred in filing and pursuing the protest, and \$14,332 in proposal preparation costs. Because PGT has been unable to reach an agreement with the Marshals Service concerning the amount of payment, PGT has requested that we determine the amount of entitlement pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1988).

We determine that PGT is entitled to reimbursement for attorneys' fees, attorneys' out-of-pocket expenses, company protest costs, proposal preparation costs and reconsideration costs for a total amount of \$52,671.52.

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### Attorneys' Fees

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The attorneys' fees claimed are broken down as follows: (1) partner—73.75 hours at \$185 per hour and 3.5 hours at \$195 per hour (the hourly fee was increased January 1, 1988); (2) first associate—28.7 hours at \$90 per hour; and (3) second associate—2.5 hours at \$90 per hour, for a total of 108.45 attorneys' hours. The hours claimed for all three attorneys (from October 24, 1987, to February 19, 1988), are supported with copies of the bills for the services, including six pages of detail that list by date the services performed and specifically identify the services rendered and the performing attorney. The partner has certified that the hours claimed were incurred on behalf of the claimant in this case, that the fees claimed were billed to the claimant, and that the hourly rates charged represent the hourly rates established and charged by his firm for services like those furnished to the claimant by attorneys with comparable qualifications.

The attorneys' out-of-pocket expenses claimed for pursuing the protest consist of \$37.50 for local messenger delivery, \$11 for express mail, \$13.55 for long-distance telephone tolls, \$76.47 for Lexis research, and \$13.29 for a lunch meeting, for a total of \$151.81. These costs are supported by copies of the attorneys' bills for the services which include the out-of-pocket disbursements.

The Marshals Service generally argues that PGT has failed to demonstrate the reasonableness of its claim. While the agency believes it should pay some amount to PGT, it contends it is unable to determine what amount. Specifically, concerning the claimed attorneys' fees, the Marshals Service argues that PGT



has failed to demonstrate the reasonableness of utilizing three attorneys on a "simple GAO protest involving no discovery or hearing."<sup>1</sup> The Marshals Service further contends it should not be required to pay attorneys' fees concerning the protest issue of comparative scoring, on which the protester was unsuccessful.

Initially, we disagree that the issue of comparative technical scoring, on which the protester did not prevail, was a separable and distinct ground of protest for which recovery is not allowable. Rather, we consider this issue an intertwined part of the successful protest, which challenged the evaluation. In this regard, one of the bases on which we sustained the protest concerned the comparative technical scoring; we held the selection determination based on the comparative numerical scoring analysis was inconsistent with the operational testing results. (The situation here is distinguishable from that in *Interface Flooring Systems, Inc.—Claim for Attorneys' Fees*, 66 Comp. Gen. 597 (1987), 87-2 CPD ¶ 106, cited by the agency, where we disallowed costs for one issue, two unrelated specifications were challenged, the grounds for challenging the specifications were equally distinct, and we sustained the protest only for one of the specifications.)

Our authority to award protest costs, including attorneys' fees, is based on the Competition in Contracting Act of 1984, 31 U.S.C. § 3554(c)(1) (Supp. IV 1986), which provides that protesters may recover the costs of filing and pursuing the protest including "reasonable attorneys' fees." The agency's position is that the protest effort by the legal counsel was duplicative or overstaffed and generally excessive given the nature of the protest, and that the fees claimed therefore are not reasonable. We have examined the costs claimed and disagree with the agency that they are excessive.

We do not question, nor does the Marshals Service, the \$185-\$195 and \$90 per hour rates billed for the partner and associates who handled the protest; these rates appear to be within the bounds of the rates normally charged by Washington, D.C. attorneys knowledgeable in the field of federal procurement law. On the number of attorney hours claimed, generally, if properly documented, they are to be accepted unless specific hours deemed to be excessive can be identified and a reasoned analysis for their rejection is articulated. See *NCR Comten, Inc.*, GSBCE No. 8229, Feb. 10, 1986, 86-2 BCA 18,822. Simply concluding that the hours claimed are excessive or suggest duplication of effort is wholly inadequate. *Id.* Here, the agency has advanced no specific instances to support a determination that the legal counsel's effort on the protest was overstaffed, and we are unable to identify any specific instances of duplication or overstaffing, based on our examination of the attorneys' bills. Accordingly, we have no basis to question the attorney hours expended and reject the agency's contention that they were unreasonably expended. We therefore allow attorneys' fees in the amount claimed, \$17,134.25.

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<sup>1</sup> In connection with attorneys' fees, the Marshals Service also originally argued that PGT failed to submit affidavits attesting to the amount of attorneys' fees billed to PGT. This argument is now moot, as PGT subsequently submitted the affidavits, as requested by the agency, and in compliance with our requirement for adequate documentation for the payment of claimed attorneys' fees. See *Malco Plastics*, B-219886.3, Aug. 18, 1986, 86-2 CPD ¶ 193.

Although the attorneys' out-of-pocket expenses claimed in the amount of \$151.81 are not separately certified, the agency does not question them, the attorneys' bills and the certification by the partner describe the expenses, and the amount claimed appears reasonable except for the \$13.29 claimed for the lunch meeting, which is not a reimbursable expense. Thus costs in the amount of \$138.52 are allowed. See *Fischer-White-Rankin Contractors, Inc.*, B-213401.3, July 22, 1986, 86-2 CPD ¶ 88.

**Costs of Filing And Pursuing Protest**

The costs claimed for filing and pursuing the protest consist of burdened employee hours worked and travel expenses. The personnel costs have been calculated by multiplying the applicable 1987 salary rate (burdened with a 175 percent overhead rate and a 16 percent general and administrative rate) by the hours claimed. The result is a total of 257 employee hours at a cost of \$29,495 as follows:

President	58 hrs	\$ 164	\$ 9,512
Outokumpu Group	16 hrs	@80	1,280
Vice President	109 hrs	@135	14,715
Product Manager	34 hrs	@62	2,108
Executive Assistant	40 hrs	@47	1,880
<b>Total</b>	<b>257 hrs</b>		<b>29,495</b>

The costs claimed, except for the Outokumpu Group electronics personnel (Outokumpu is PGT'S Finnish parent company), are properly certified. Additionally, travel costs are claimed in the amount of \$278, consisting of two trips by Mr. Wagman (PGT Vice President) to Washington, D.C., one to meet with Mr. Smith (attorney), and the other to attend the bid protest conference in our Office. The travel costs are unsupported.

We disallow 80.7 hours of the total 257 hours claimed for a total of \$7,517 in disallowed company costs for filing and pursuing the protest. First, the 16 hours claimed for the Outokumpu Group electronics personnel are not supported by certification or individual affidavits, and the claimed travel costs are totally unsupported; as these costs are insufficiently documented they are not allowable. *Malco Plastics*, B-219886.3, Aug. 18, 1986, 86-2 CPD ¶ 193. Next, we disallow 50.4 hours of costs which were incurred in pursuit of the agency level protest, prior to the filing of the protest with our Office. Our Bid Protest Regulations provide for reimbursement of costs incurred in filing and pursuing only protests before our Office; thus, we disallow costs incurred in connection with the agency level protest. 4 C.F.R. § 21.6(d)(1) (1988). Finally, we disallow 1 hour of cost incurred for the vice president for discussion and review of patents for PGT's product (after receipt of the agency report) and 13.3 hours for typing of correspondence to the Outokumpu Group on the basis that the claimant has not

shown these costs to be related to pursuit of the protest before our Office. The specific disallowed hours and costs are as follows:

President	10 hrs.	@164	\$1,640
Outokumpu Group	16 hrs.	@ 80	1,280
Vice President	22 hrs.	@135	2,970
Product Manager	6 hrs.	@ 62	372
Executive Assistant	26.7 hrs.	@ 47	1,255
<b>Total</b>	<b>80.7</b>		<b>\$7,517</b>

Of the remaining \$21,978 of the company's claimed protest costs, the Marshals Service has not identified specific hours as excessive or articulated reasons for their rejection or otherwise shown them to be unreasonable, *i.e.*, has not shown that they exceed, in nature and amount, the costs that would be incurred by a prudent person in the pursuit of his protest. *See Patio Pools of Sierra Vista, Inc.—Claim for Costs*, B-228187.4, B-228188.3, Apr. 12, 1989, 68 Comp. Gen. 383, 89-1 CPD ¶ 374. Thus, we have no basis to question the remaining hours expended and allow company costs claimed for filing and pursuing the protest in the amount of \$21,978 (\$29,495-\$7,517).

### Proposal Preparation Costs

The proposal preparation costs claimed consist of burdened employee hours worked. They have been calculated in a manner identical to that previously described for the costs for filing and pursuing the protest, and have also been properly certified and supported (except for the Outokumpu Group personnel). The result is a total of 159 employees' hours at a cost of \$14,332, as follows:

President	20 hrs.	@ \$164	\$ 3,280
Executive Assistant	30 hrs.	@ 64	1,920
Outokumpu Group	12 hrs.	@ 80	960
Field Service Manager	4 hrs.	@ 58	232
Vice President	38 hrs.	@ 135	5,130
Product Manager	15 hrs.	@ 62	930
Executive Assistant	40 hrs.	@ 47	1,880
<b>Total</b>	<b>159 hrs.</b>		<b>\$14,332</b>

The agency maintains that it was unreasonable for PGT to expend 159 hours in this endeavour considering the brevity of PGT's proposal; that PGT should have been familiar with the standard clauses and sections of the solicitation as a result of a previous contract; and that the hours claimed therefore are excessive. Further, the agency argues that since timecards have not been presented, the claimant has not submitted adequate documentation to support its claimed costs.

On the documentation of the claimed costs, the claimant has now submitted individual affidavits from the employees and certification from the firm's controller as to the hourly rate of the employees participating in the preparation of the proposal, except for the Outokumpu employees. We consider the affidavits of the individual employees submitted sufficient evidence to support the claim, as the time cards the agency specifically requests do not exist. However, the Outokumpu Group employee hours are not supported by individual affidavits, nor are their hourly rates certified. Accordingly, the costs for these employees are denied due to inadequate documentation. *See Fischer-White-Rankin Contractors, Inc.*, B-213401.3, *supra*.

On the remaining proposal preparation hours claimed, as in the previous portions of the claim, the agency has simply concluded that the hours claimed are excessive; it has not identified specific hours as excessive nor has it articulated a reasoned analysis for their rejection, and thus has not shown that the amount exceeds that which would be incurred by a prudent person in preparation of its proposal. *See Patio Pools of Sierra Vista, Inc.—Claim for Costs*, B-228187.4, *supra*. Under these circumstances, we have no reason to question the proposal preparation costs on the basis of hours expended. *See NCR Comten, Inc.*, GSBGA No. 8229 *supra*.

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### Cost Of Pursuing Claim

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PGT requests reimbursement in the amount of \$12,000.63 in costs, including legal fees, associated with pursuing this claim. Such costs are not allowable, however, since no statute or contract provision authorizes their recovery. *Malco Plastics*, B-219886.3, *supra*. However, included in these costs is one-fourth of an hour of counsel's time, at \$195 per hour, for the firm's defense of an unsuccessful reconsideration request by the agency. Such reconsideration costs are allowable. *See Pacific Northwest Bell Telephone Co., et al.*, 67 Comp. Gen. 441, (1988), 88-1 CPD ¶ 527. Thus, \$48.75 is allowed for these costs.

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### Conclusion

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In sum, we determine PGT is entitled to recover \$17,134.25 in attorneys' fees, \$138.52 in attorneys' out-of-pocket expenses, \$21,978 in company protest costs, \$13,372 for proposal preparation costs, and \$48.75 in reconsideration costs, for a total of \$52,671.52.

**Procurement**

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**Sealed Bidding**

■ Use

■ ■ Criteria

Where all elements enumerated in the Competition in Contracting Act, 10 U.S.C. § 2304(a)(2) (Supp. IV 1986), for the use of sealed bidding procedures are present, agencies are required to use those procedures and do not have discretion to employ negotiated procedures.

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**Matter of: Northeast Construction Company**

Northeast Construction Company protests the Department of the Air Force's use of competitive negotiation rather than sealed bidding procedures to procure repair and construction work under request for proposals (RFP) Nos. F04626-89-R-0003 (RFP-0003) and F07603-89-R-8202 (RFP-8202). Northeast argues that the Air Force is required to employ sealed bidding procedures for these acquisitions.<sup>1</sup>

We sustain the protests.

Both RFPs contemplate the award of firm-fixed-price contracts for the performance of various repair and improvement construction to military family housing units. Principal items of work include replacing roofs and windows, and painting of new and existing areas. RFP-0003 is for the performance of the work at Travis Air Force Base, and RFP-8202 is for performance at Dover Air Force Base. The latter RFP provides for various additive items in addition to a stated basic requirement, and both RFPs contain stated "per unit" cost limitations. Additionally, both RFPs provide for contract award on the basis of "price only," and neither RFP requires the submission of technical proposals. These protests were filed prior to the closing dates for receipt of initial proposals; the closing dates for both RFPs have been extended indefinitely.

Northeast argues that both RFPs violate the provision of the Competition in Contracting Act (CICA), 10 U.S.C. § 2304(a)(2) (Supp. IV 1986), which provides that, in determining which competitive procedure is appropriate to a given circumstance, an agency:

shall solicit sealed bids if—

- (i) time permits the solicitation, submission, and evaluation of sealed bids;
- (ii) the award will be made on the basis of price and other price-related factors;
- (iii) it is not necessary to conduct discussions with the responding sources about their bids; and
- (iv) there is a reasonable expectation of receiving more than one sealed bid . . . .

According to Northeast, all of the enumerated criteria for the use of sealed bids are met by the acquisitions in question and, consequently, the Air Force is required to use sealed bidding procedures.

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<sup>1</sup> Northeast has been joined in this protest by eight other potential offerors as interested parties who also urge the use of sealed bidding procedures here.

The Air Force responds that it is justified in using negotiated procurement procedures because it expects there to be a need for discussions. Specifically, the Air Force argues that, because of the "complexity" of the projects, it concluded that negotiations might be required. With respect to RFP-0003, the Air Force argues that cost limitations associated with the project might require discussions should any or all of the offerors exceed the cost limitations. In short, the Air Force argues that it employed negotiation procedures in order to avoid solicitation cancellations in the event of pricing in excess of the cost limitations as well as to ensure through discussions that the offering firms fully understand the nature and complexity of the required services.

Our Office has previously held that the use of sealed bidding procedures is required where the conditions specified in CICA, 10 U.S.C. § 2304(a)(2), are present. See *ARO Corp.*, B-227055, Aug. 17, 1987, 87-2 CPD ¶ 165, *aff'd*, *The Defense Logistics Agency—Request for Reconsideration*, 67 Comp. Gen. 16 (1987), 87-2 CPD ¶ 365. Our decision in that case was based upon the mandatory nature of the language found in 10 U.S.C. § 2304(a)(2) as well as the supporting legislative history of that provision.<sup>2</sup> Simply stated, an agency is required to use sealed bids where: (1) time permits; (2) award will be based on price and price-related factors; (3) discussions are not necessary; and (4) more than one bid is expected to be received. Here, we think that the acquisitions in question fit squarely into the terms of the statute's requirements and that, consequently, the Air Force was required to employ sealed bidding procedures.

First, the Air Force has not alleged that insufficient time exists to permit using sealed bid procedures or that there is not a reasonable expectation of receiving more than one bid. Second, the award in both procurements will be based upon price alone without consideration of technical evaluation criteria; indeed, the RFPs do not even contemplate the submission of technical proposals. Third, we do not think that the Air Force has demonstrated that discussions will be necessary. In this regard, we note that while the Air Force alleges that discussions may be necessary to insure that all firms have a complete understanding of the specifications, we fail to understand how responding offerors will be evaluated for understanding given the absence of a requirement for the submission of technical proposals. Compare *Essex Electro Engineers, Inc.*, 65 Comp. Gen. 242 (1986), 86-1 CPD ¶ 92, where technical proposals, to be evaluated against specific criteria, were required. Stated differently, we fail to see how the Air Force will discover technical deficiencies in submissions which are comprised only of a price schedule and a blanket statement of compliance with all specifications.<sup>3</sup> We also note that the Air Force has failed to provide any explanation of why the projects are complex or are other than routine construction work. The Air Force has also failed to state what the subject of any discussions would be.

<sup>2</sup> See S. Rep. No. 98-50, 98th Cong. 2nd Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 2191; H.R. Rep. No. 98-861, 98th Cong. 2nd Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 2110.

<sup>3</sup> To the extent that the Air Force wishes to give consideration to a responding firm's ability to perform in accordance with its agreement to comply with the specifications, we think that an investigation of the firm's responsibility is the appropriate vehicle for this purpose.

In addition, we note that the acquisitions' cost limitations are stated in both RFPs. Under such circumstances, we are unpersuaded that firms wishing to prepare a responsive submission will knowingly exceed the clearly disclosed cost limitations. In any event, should all responding firms ultimately submit above-cost bids, the Federal Acquisition Regulation (FAR) provides an adequate mechanism for converting a solicitation from a sealed bidding format to a negotiated format without the need for solicitation cancellation. FAR § 15.103 (FAC 84-5).

Accordingly, by separate letter of today, we are recommending that the RFPs in question be canceled and reissued using sealed bidding procedures. In addition, we find Northeast to be entitled to the costs of filing and pursuing its protests, including attorneys' fees.

The protests are sustained.

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**B-234123, April 25, 1989**

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**Procurement**

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**Sealed Bidding**

■ **Bid guarantees**

■ ■ **Sureties**

■ ■ ■ **Acceptability**

General Accounting Office will not disturb agency's determination that individual sureties are acceptable where record does not show that determination was made in bad faith; there was no information available to contracting officer prior to award that should have prompted her to undertake independent investigation of sureties, beyond consideration of documentation furnished with bid.

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**Matter of: C.E. Wylie Construction Company**

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C.E. Wylie Construction Company protests the Department of the Navy's award of a contract to Continental Construction Corporation, under invitation for bids (IFB) No. N62474-85-B-5114, for military construction projects. Wylie alleges that Continental's proposed individual sureties are unacceptable, and that Continental thus was not eligible for the award.

We deny the protest.

The IFB required bids to be accompanied by a bid bond in an amount equal to 20 percent of the bid. At the December 20, 1988 bid opening, Continental submitted the low bid of \$8,040,000 and provided a bid bond naming two individual sureties. In accordance with solicitation instructions, Continental provided for each surety a completed Affidavit of Individual Surety (Standard Form 28) listing the surety's assets, liabilities and net worth, and a Certificate of Sufficiency from a bank or trust company officer attesting to the truth of the surety's representations.

On December 21, Wylie, which submitted the second low bid of \$8,227,000, filed an agency level protest asserting that Continental's individual sureties did not

have sufficient net worths to cover the full amount of the bid bond; Wylie stated it would provide specific information and documentation supporting these allegations "in the near future." After reviewing Continental's bid bond and the affidavits, however, the contracting officer concluded that the bond was properly executed and that the sureties had adequate resources to cover the penal amount of the bond. When Wylie failed to furnish the promised supporting documentation by December 30, the Navy decided to proceed with award to Continental to assure completion of the projects as soon as possible. Wylie thereafter filed this protest with our Office, along with supporting information not previously provided to the Navy.

Wylie alleges that the sureties are unacceptable, and that Continental therefore is nonresponsive, because the sureties allegedly misrepresented their ownership of real property and their overall net worths in the affidavits accompanying the bond; a clerk signed one surety's Certificate of Sufficiency, but misrepresented herself as a banking officer; and the person who signed the other surety's Certificate of Sufficiency misrepresented herself as president of a trust company in Texas when the company in fact was not authorized to do business as a trust company in Texas.

Wylie contends that the Navy failed to exercise proper business judgment and acted in bad faith in determining the acceptability of the individual sureties without first performing an investigation verifying the truthfulness of the sureties' representations. Wylie argues that the obligation to investigate was especially strong here in view of its preaward protest questioning the acceptability of the sureties and the sureties' failure to provide more than general, undocumented representations concerning their assets. In this regard, Wylie notes that one of the sureties did not provide proof of ownership of his claimed real property, listed only the counties, and not the addresses, where the property is located, and failed to provide financial statements for a corporation he purports to own. Similarly, Wylie notes that the other individual surety failed to list the companies in which his asserted \$2.5 million in stock was held, and did not identify and document the furniture, antiques, and notes receivable listed as assets.

The financial acceptability of an individual surety, including the accuracy of information concerning the surety's financial condition, is a matter of responsibility. *Transcontinental Enterprises, Inc.*, 66 Comp. Gen. 549 (1987), 87-2 CPD ¶ 3. The contracting officer is vested with a wide range of discretion and business judgment in considering responsibility matters, and we will not object to an affirmative determination in this type of case unless the protester shows that procuring officials acted in bad faith.

Here, we find no information available to the contracting officer prior to award that should have prompted her to conduct her own independent investigation into the sureties' acceptability. Although the sureties' description of their assets was somewhat general, there were no apparent inconsistencies in the information, and we think the contracting officer could properly take into account the fact that the sureties' representations were made under oath and that a bank or



trust officer had certified that, based on her personal investigation, the representations were true.

While we would agree that information made available to the agency in the course of an agency-level protest could warrant further examination of a surety's acceptability, Wylie presented no verifiable information in its protest, but instead merely alleged generally that the sureties lacked adequate net worths to support the bond and promised further details; Wylie failed to provide any specific information in support of its claim even though the contracting officer waited 9 days for the promised details before proceeding with award. *Cf. Eastern Maintenance and Services, Inc.*, B-229734, Mar. 15, 1988, 88-1 CPD ¶ 266 (agency not required to delay award indefinitely while prospective awardee attempts to cure problem concerning responsibility of surety).

Accordingly, we conclude that it was not unreasonable for the contracting officer to rely on the sureties' representations without conducting her own investigation, and that there is no basis to find that the contracting officer acted in bad faith.

The protest is denied.

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# Appropriations/Financial Management

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## **Accountable Officers**

### **■ Cashiers**

### **■■ Relief**

### **■■■ Illegal/improper payments**

### **■■■■ Fraud**

Under the provisions of 31 U.S.C. § 3527(c), we deny relief to a Veterans Administration cashier who accepted for deposit a fraudulently negotiated draft and who later permitted withdrawal from a patron's account amounts credited for these deposits. The cashier negligently failed to follow printed instructions to call the bank for an authorization number before cashing. Had the cashier followed the instructions, clearly printed on the draft, the cashier would not have accepted the drafts for deposit and permitted subsequent withdrawals of the supposed deposits.

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## **Judgment Payments**

### **■ Attorney fees**

An employee who filed an agency grievance alleging that his reassignment was in retaliation for his whistleblowing, received a favorable settlement but no backpay or other monetary award. Since the grievance did not involve a reduction or denial of pay or allowances, it was not subject to the Back Pay Act, as amended, 5 U.S.C. § 5596 (1982). He may not be reimbursed his attorney fees since there is no statutory or other authority for the payment of attorney fees in connection with an administrative grievance proceeding where there is no backpay or other monetary award.

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### **■ Attorney fees**

An employee who settled an agency grievance may not be reimbursed his attorney fees under the Equal Access to Justice Act. The Act only applies to "adversary adjudications" and the agency grievance is not within the statutory definition of an adversary adjudication.

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# Civilian Personnel

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## Compensation

### ■ Overtime

### ■ ■ Eligibility

### ■ ■ ■ Advance approval

An employee who performed and was paid for overtime work during a 4-month period claims overtime for another 4 months after his supervisor indicated he should no longer request payment for overtime. The employee may not be paid overtime under 5 U.S.C. § 5542 (1982) during the second 4-month period. Such overtime was not ordered or approved and there was no inducement on the part of the supervisor for the employee to continue to perform overtime work.

385

### ■ Compensation restrictions

### ■ ■ Deferred compensation

### ■ ■ ■ Propriety

### ■ Propriety

### ■ ■ Bonuses

### ■ ■ ■ Compensation restrictions

In our opinion the Tennessee Valley Authority (TVA) may not circumvent the statutory ceiling on the salaries of TVA employees through deferred compensation supplemental retirement plans or lump-sum payments for relocation incentives. We disagree with TVA's distinction between "salary" and "compensation" for the purposes of the statutory ceiling. *See* B-222334, June 2, 1986; B-2205284, Nov. 16, 1981. To the extent that TVA performance bonuses are modeled after the bonus program for the federal Senior Executive Service, we would not view such payments as improperly circumventing the TVA salary limitation.

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## Relocation

### ■ Residence transaction expenses

### ■ ■ Appraisal fees

### ■ ■ ■ Reimbursement

A transferred employee claims reimbursement for a fee paid to the lender reflecting an appraiser's charge for inspecting the employee's newly constructed residence prior to the closing date. Pursuant to FTR, para. 2-6.2d(1)(j), only those construction expenses which are comparable to allowable expenses associated with the purchase of an existing residence may be reimbursed. The customary cost of an appraisal is such an expense and is, therefore, reimbursable as provided by FTR, para. 2-6.2b.

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■ Residence transaction expenses  
■ ■ Miscellaneous expenses  
■ ■ ■ Reimbursement

A transferred employee claims reimbursement for shipping charges incurred by him to speed delivery of his loan documents to the lender incident to the purchase of a residence. The claim is denied. Such shipping charges are not specifically listed as items to be reimbursed under FTR, para. 2-6.2d(1)(a-e) (Supp. 4, Oct. 1, 1982). Nor are shipping (delivery) charges "similar in nature" to the specifically listed reimbursable items as authorized in FTR, para. 2-6.2d(1)(f). None of the listed authorized expenses relates to shipping or delivery fees; therefore, the shipping charges may not be allowed under any of those clauses, nor under FTR, para. 2-6.2f which authorizes reimbursement for incidental charges since the expense was not for a "required service."

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■ Residence transaction expenses  
■ ■ Mortgage insurance  
■ ■ ■ Reimbursement

A transferred employee claims reimbursement for two title insurance policy endorsements. FTR, para. 2-6.2d(1)(h) specifically authorizes reimbursement of mortgage title insurance premiums paid for by employees and required by lenders. The endorsements are reimbursable.

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Travel  
■ Travel expenses  
■ ■ Fraud  
■ ■ ■ Effects

Four employees admitted providing false information on travel vouchers for the cost of meals and incidental expenses incurred while on temporary duty. Where any subsistence item shown on a voucher for a particular day is fraudulent, the finding taints the entire per diem or actual expenses for that day. Thus, lodging claims for the same days of duty may not be paid. 60 Comp. Gen. 357 (1981), amplified.

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# Procurement

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- GAO procedures
  - ■ Preparation costs
  - ■ ■ Attorney fees
  - ■ ■ ■ Amount determination

Attorneys' fees claimed by prevailing protester are determined reasonable, and thus are allowable, where the hourly rates are within bounds of rates charged by similarly situated attorneys, and the hours claimed are properly documented and do not appear to be excessive.

400

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## Bid Protests

- GAO procedures
- ■ Preparation costs

Claimant is entitled to recover incurred company costs of filing and pursuing General Accounting Office protest, but not agency-level protest where costs claimed were sufficiently documented and agency did not articulate a reasoned analysis for the rejection of specific hours or show the costs to be otherwise unreasonable.

400

- GAO procedures
- ■ Preparation costs
- ■ ■ Attorney fees

Request for payment of costs associated with pursuing claim for recovery of attorneys' fees and costs of filing and pursuing protest are denied since such costs are not recoverable in the absence of express statutory or contractual authority.

400

- Subcontracts
- ■ GAO review

Protest of a subcontract awarded by a government prime contractor is dismissed where the subcontract is not "by or for" the government.

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## Competitive Negotiation

- Offers
- ■ Preparation costs

Claimant is entitled to recover proposal preparation costs which are adequately documented and shown to be allocable to the subject procurement.

400

■ Offers

■ ■ Preparation costs

Where protester's refusal to submit sufficient documentation supporting the amount of its claim for proposal preparation costs and the cost of filing and pursuing a protest effectively prevents the contracting agency from determining reasonableness of amount it ultimately will have to pay, General Accounting Office will not review the claim *de novo*.

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Contractor Qualification

■ Approved sources

■ ■ Alternate sources

■ ■ ■ Approval

■ ■ ■ ■ Government delays

Unwarranted delays in agency's alternate source approval process that prevented prompt qualification of protester's product is not basis for sustaining protest where agency canceled the solicitation with the intention of postponing the acquisition until approval of the protester's product was completed, and then proceeded to complete approval of protester's product; protester will have opportunity to compete for requirement and thus was not competitively prejudiced by the delays.

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■ Responsibility/responsiveness distinctions

■ ■ Sureties

■ ■ ■ Financial capacity

Alleged defects in affidavit of individual surety submitted with bid bond do not affect responsiveness of bid since affidavit serves only to assist the contracting officer in determining the surety's responsibility.

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■ Responsibility/responsiveness distinctions

■ ■ Sureties

■ ■ ■ Financial capacity

Bid is responsive despite individual surety's failure to file pledge of assets with bid bond since a pledge of assets is information which bears on responsibility and, as such, may be furnished any time prior to award.

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**Sealed Bidding**

- **Bid guarantees**
- ■ **Responsiveness**
- ■ ■ **Signatures**
- ■ ■ ■ **Authority**

The validity of a bid is not affected by the bidder's failure to affix a corporate seal to the bid or the bid bond.

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- **Bid guarantees**
- ■ **Responsiveness**
- ■ ■ **Signatures**
- ■ ■ ■ **Omission**

Failure of a bidder to sign a bid bond in the capacity of principal constitutes a minor informality that can be waived where the unsigned bond is submitted with a signed bid.

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- **Bid guarantees**
- ■ **Sureties**
- ■ ■ **Acceptability**

General Accounting Office will not disturb agency's determination that individual sureties are acceptable where record does not show that determination was made in bad faith; there was no information available to contracting officer prior to award that should have prompted her to undertake independent investigation of sureties, beyond consideration of documentation furnished with bid.

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- **Contract awards**
- ■ **Propriety**
- ■ ■ **Evaluation criteria**
- ■ ■ ■ **Defects**

Solicitation is defective where it lists eight evaluation factors, including price, in descending order of importance when in fact non-price factors were intended to be used only to determine whether the offerors were technically acceptable, not as the basis for a relative evaluation of the offerors' technical merit, and contracting agency in fact intended to award to the lowest priced technically acceptable offeror. Nevertheless, agency properly may make award under the defective solicitation since there is no indication that any offeror was prejudiced by the defect and the awardee's product meets the agency's needs.

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**■ Use**  
**■ ■ Criteria**

Where all elements enumerated in the Competition in Contracting Act, 10 U.S.C. § 2304(a)(2) (Supp. IV 1986), for the use of sealed bidding procedures are present, agencies are required to use those procedures and do not have discretion to employ negotiated procedures.

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**Socio-Economic Policies**

**■ Small businesses**  
**■ ■ Competency certification**  
**■ ■ ■ Reconsideration**  
**■ ■ ■ ■ Additional information**

There is no legal requirement that the contracting agency request Small Business Administration (SBA) reconsideration of a nonresponsibility determination where, following determination that bidder is nonresponsible and SBA declination to issue certificate of competency, the contracting officer reconsiders the nonresponsibility determination in light of new information submitted by bidder and reasonably determines that reversal of the nonresponsibility determination is not warranted.

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**Specifications**

**■ Minimum needs standards**  
**■ ■ Competitive restrictions**  
**■ ■ ■ Allegation substantiation**  
**■ ■ ■ ■ Evidence sufficiency**

Protest that specification for copiers unduly restricts competition is sustained when agency does not establish that requirement that copiers use dry toner only is necessary to meet the government's needs.

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**Contract Management**

**■ Contract modification**  
**■ ■ Cardinal change doctrine**  
**■ ■ ■ Criteria**  
**■ ■ ■ ■ Determination**

Protest that a contract modification was beyond the scope of the contract is denied where the modification did not result in the procurement of services materially different from the services competed under the original contract.

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